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AMERICAN

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ENGLISH

RAILROAD CASES

A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT
IN AMERICA AND ENGLAND.

VOL. V.

NORTHPORT, NEW YORK
EDWARD THOMPSON

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TABLE

OF THE CASES REPORTED.

	PAGE
Allegheny Valley R. R. Co., Jackson *v.*	337
——— Munhall *v.*	337
Allen *v.* Burlington, etc., R. R. Co.	620
———, Kansas Central R. R. Co. *v.*	362
Andrews, Central Branch U. P. R. R. Co. *v.*	370
Atchison, etc., R. R. Co. *v.* Bobb.	412
——— Central Branch U. P. R.R. Co. *v.*	389
——— *v.* Lyon	295
——— *v.* Rockwood	432
Aurora, City of, Chicago, etc., R. R. Co. *v.*	191
Baldwin, St. Joseph, etc., R. R. Co. *v.*	408
Ballou *v.* Chicago, etc., R. R. Co.	480
Barber, National Bank of Lawrence *v.*	181
Binkert *v.* Wabash R. R. Co.	113
Bobb, Atchison, etc., R. R. Co. *v.*	412
Booker *v.* Venice, etc., R. R. Co.	357
Branagan, Toledo, etc. R. R. Co. *v.*	630
Broadway, etc., R. R. Co., Kinsman Street R. R. Co. *v.*	327
Brown *v.* Chester, etc., R. R. Co.	220
Burlington, etc., R. R. Co., Allen *v.*	620
———, Van Orsdal *v.*	53
Cagwin *v.* Town of Hancock	150
Cairo, etc., R. R. Co. *v.* Howry	62
——— *v.* Stevens	58
Carthage, Village of, Cincinnati, etc., R. R. Co. *v.*	306
Cass, County of, *v.* Certain Lands.	404
Central Branch U. P. R. R. Co. *v.* Andrews	370
——— *v.* Atchison, etc., R. R. Co.	389
———, Shoup *v.*	125
Central Iowa R. R. Co., Ferguson *v.*	614
Certain Lands, County of Cass *v.*	404
Chester, etc., R. R. Co., State ex rel. Brown *v.*	220
Chicago, etc., R. R. Co., Ballou *v.*	480
Chicago *v.* City of Aurora	464
———, Delie *v.*	191
——— *v.* Dunbar	253
——— et al., Grinnell et al. *v.*	447
———, Gumz *v.*	583
———, Kelley *v.*	469
———, Lance *v.*	617
——— *v.* Mallory	139
———, Manuel *v.*	588
——— *v.* Maroney	360
———, Naylor *v.*	460
——— *v.* People ex rel. Dennison.	94
——— *v.* Prussing	289
———, Wiggins' Ferry Co. *v.*	1
Cincinnati, etc., R. R. Co. *v.* Village of Carthage	306
City of Aurora, Chicago, etc., R.R. Co. *v.*	191
City of Menasha *v.* Milwaukee etc., R. R. Co.	300
——— *v.* Bobb	412
Clay, County of, *v.* Society for Savings	170
Collarn, Ohio, etc., R.R. Co. *v.*	554
Commonwealth, Northern Central R. R. Co. *v.*	318
County of Cass, et al. *v.* Certain Lands	404
County of Clay *v.* Society for Savings	170
County of Daviess, Ogden *v.*	145
Davenport, etc., R. R. Co. *v.* Renwick	90
Daviess, County of, Ogden *v.*	145
Dayton, etc., R. R. Co., State *v.*	312
De Forth *v.* Wisconsin, etc., R. R. Co	28
Delie *v.* Chicago, etc., R. R. Co.	464
Dennison, Chicago, etc., R. R. Co., *v.*	94
Draper *v.* Town of Springport	205
Dunbar, Chicago, etc., R. R. Co., *v.*	253
Dunlop, Toledo, etc., R. R. Co. *v.*	378

Digitized by Google

	PAGE
Dunmeyer, Kansas Pacific R. R. Co. *v.*	417
Edens *v.* Hannibal, etc., R. R. Co.	459
Eichels *v.* Evansville Street Ry. Co.	274
Emslie *v.* Young	422
Evansville Street Ry. Co., Eichels *v.*	274
Ferguson *v.* Central Iowa R. R. Co.	614
First Division St. Paul, etc., R. R. Co., Schroeder *v.*	298
Flint, etc., R. R. Co. *v.* Willey	305
Fond du Lac, etc., R. R. Co., O'Connor *v.*	82
Franklin Savings Bank, Town of Springport *v.*	199
Fremont, etc., R. R. Co., *v.* Lamb	367
——— *v.* Whalen	364
German Uptown Savings Bank, Town of Springport *v.*	199
Germany, ex parte	208
Goddard *v.* Stockman	164
Greenville, etc., R. R. Co., Mills *v.*	55
Grinnell et al. *v.* Chicago, etc., R. R. Co, et al	447
Gumz *v.* Chicago, etc., R. R. Co.	583
Haley, Missouri, etc., R. R. Co. *v.*	594
Hancock, Town of, Cagwin *v.*	150
Hannibal, etc., R. R. Co., Edens *v.*	459
Hastings, etc., R. R. Co., Pfleger *v.*	85
Henderson, Pittsburg, etc., R. R. Co. *v.*	529
Houston, etc., R. R. Co. *v.* Willie.	541
Howland *v.* Milwaukee, etc., R. R. Co.	578
Howry, Cairo, etc., R. R. Co. *v.*	62
Incorporated Village of Carthage, Cincinnati, etc., R. R. Co. *v.*	306
Jackson *v.* Allegheny Valley R. R. Co.	337
——— *v.* Pennsylvania R. R. Co.	337
Jeffersonville, etc., R. R. Co. *v.* Oyler	397
Jeffrey *v.* Keokuk, etc., R. R. Co.	568
Jewett, Slater *v.*	515
Kansas Central R. R. Co. *v.* Allen.	362
Kansas City, etc., R. R. Co., Munkres *v.*	79
——— Shane *v.*	64
Kansas Pacific R. R. Co. *v.* Dunmeyer	417
Kelley, *v.* Chicago, etc., R. R. Co.	469
Keokuk, etc., R. R. Co., Jeffrey *v.*	568
Kinsman Street R. R. Co. *v.* Broadway, etc., R.R. Co.	327
Lake Shore, etc., R. R. Co. *v.* Lavalley	549
———, *v.* McCormick	474
Lance *v.* Chicago, etc., R. R. Co.	617
Lamb, Fremont, etc., R. R. Co. *v.*	367
Lavalley, Lake Shore, etc., R. R. Co. *v.*	549
Little Rock, etc., R. R. Co. *v.* Pankhurst	635
Long Island R. R. Co., McCosker *v.*	564
Louisville, etc., R. R. Co. *v.* Wolfe	625
Lyon, Atchison, etc., R. R. Co. *v.*	295
McCormick, Lake Shore, etc., R. R. Co. *v.*	474
McCosker *v.* Long Island R. R. Co.	564
Mallary, Chicago, etc., R. R. Co. *v.*	139
Manuel *v.* Chicago, etc., R. R. Co.	588
Maroney, Chicago, etc., R. R. Co. *v.*	360
Mellen, Michigan Air Line R. R. Co. *v.*	245
Menasha, City of, *v.* Milwaukie, etc., R. R. Co.	300
Michigan Air Line R. R. Co. *v.* Mellen	245
Mills *v.* Greenville, etc., R. R. Co.	55
Milwaukie, etc., R. R. Co. City of Menasha *v.*	300
———, Howland *v.*	578
Missouri, etc., R. R. Co. *v.* Noyes	440
Missouri Pacific R. R. Co. *v.* Haley	594
Moore, Union R. R. Transfer, etc., R. R. Co. *v.*	346
Morris, St. Louis, etc., R. R. Co *v.*	48
Munhall *v.* Allegheny Valley R. R. Co.	337
———, *v.* Pennsylvania R. R. Co.	337
Munkres *v.* Kansas City, etc., R. R. Co.	79
National Bank of Lawrence *v.* Barber	181
Naylor *v.* Chicago, etc., R. R. Co.	460
Northern Central R. R. Co. *v.* Commonwealth	318
———, Painton *v.*	454
Noyes, Missouri, etc., R. R. Co. *v.*	440
O'Connor *v.* Fond du Lac, etc., R. R. Co.	82
———, *v.* St. Louis, etc., R. R. Co.	324
Ogden *v.* County of Daviess	145
Ohio, etc., R. R. Co. *v.* Weber	101
———, *v.* Collarn	554
Oyler, Jeffersonville, etc., R. R. Co. *v.*	397
Painton *v.* Northern Central R. R. Co.	454
Pankhurst, Little Rock, etc., R. R. Co. *v.*	635
Pennsylvania R. R. Co., Jackson *v.*	337
———, Munhall *v.*	337
People ex rel Dennison, Chicago, etc., R. R. Co. *v.*	94
Peoria Grape Sugar Co., Truesdale *v.*	248
Pfleger *v.* Hastings, etc., R. R. Co.	85

Digitized by Google

	PAGE
Pittsburg, etc., R. R. Co. *v.* Henderson	529
——, *v.* Ranney	533
——, *v.* Sentmeyer	506
Pittsburg, etc., R. R. Co. *v.* Wright	628
Post, Welch, *v.*	158
Prussing, Chicago, etc., R. R. Co. *v.*	289
Railway Co. *v.* Renwick	90
Rains *v.* St. Louis, etc., R. R. Co.	610
Ranney, Pittsburg, etc., R. R. Co. *v.*	533
Renwick, Railway Co. *v.*	90
Rockwood, Atchison, etc., R. R. Co. *v.*	432
Rowland, ex parte	208
St. Joseph, etc., R. R. Co. *v.* Baldwin	408
St. Louis, etc., R. R. Co. *v.* Morris	48
—— O'Connor, *v.*	324
—— Rains, *v.*	610
Schroeder *v.* First Division St. Paul, etc., R. R. Co	298
Sentmeyer, Pittsburg, etc. R. R. Co., *v.*	506
Shane *v.* Kansas City, etc., R. R. Co	64
Shoup *v.* Central Branch U. P. R. R. Co	125
Shultze, ex parte	206
Slater *v.* Jewett	515
Society for Saving, County of Clay, *v.*	170
Springport, Town of, Draper *v.*	205
—— *v.* Franklin Savings Bank	199
—— *v.* German Uptown Savings Bank	199
—— *v.* Teutonia Savings Bank	199
State *v.* Dayton, etc., R. R. Co	312
—— Yononski *v.*	40
State ex rel. Brown *v.* Chester, etc., R. R. Co	220
Stevens, Cairo, etc., R. R. Co. *v.*	58
Stockman, Goddard *v.*	164
Teutonia Savings Bank, Town of Springport *v.*	199
Toledo, etc., R. R. Co. *v.* Branagan	630
—— *v.* Dunlop	378
Town of Hancock, Cagwin *v.*	150
Town of Springport *v.* Teutonia Savings Bank	199
Truesdale *v.* Peoria Grape Sugar Co	248
Union R. R. Transfer, etc., Co. *v.* Moore	346
Van Orsdal *v.* Burlington, etc., R. R. Co	53
Venice, etc., R. R. Co., Booker *v.*	357
Wabash R. R. Co., Binkert *v.*	113
Weber, Ohio, etc., R. R. Co. *v.*	101
—— Wilson *v.*	112
Welch *v.* Post	158
Western Union R. R. Co., Williams *v.*	290
Whalen, Fremont, etc., R. R. Co. *v.*	364
Wiggins Ferry Co. *v.* Chicago, etc., R. R. Co	1
Willey, Flint, etc., R. R. Co. *v.*	305
Williams *v.* Western Union R. R. Co	290
Willie, Houston, etc., R. R. Co. *v.*	541
Wilson *v.* Weber	112
Wisconsin, etc., R. R. Co., De Forth *v.*	28
Wolfe, Louisville, etc., R. R. Co. *v.*	625
Wright, Pittsburg, etc., R. R. Co. *v.*	628
Yononski *v.* State	40
Young, Emslie *v.*	422

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TABLE OF CASES

CITED BY THE COURT.

PAGE

Aikin *v.* Albany R. R., 26 Barb., 289 11
Allen *v.* Morrison, 8 B. & C., 565. 198
Anderson *v.* Mitchell, 58 Ind., 592. 166
Atchison, etc., R. R. Co. *v.* Bobb., 24 Kans., 678..... 488
——— *v.* Catlin Copp's Pub. Land Laws, No. 411, 894..... 430
——— *v.* Garside, 10 Kans., 562.... 298
——— *v.* Rock wood, 292..... 446
Attorney Brown, *v.* Duselenis, 14 S. A. Am..... 279
Atty. General, *v.* Forbes, 2 Mylne & Co., 123..... 316
——— *v.* Stewart, 21 N. J., 340. .. 316
Attix *v.* Pelan, 5 Clark (Iowa), 336. 11
Baldwin *v.* R. R. Co., 50 Ia., 680. 487
Baulec *v.* N. Y., etc., R. R. Co., 59 N. Y., 356..... 562
Baxter *v.* Roberts, 44 Cal., 187 ... 473
Berg *v.* Chicago, etc., R. R. Co., 2 Am. & Eng. R. R. Cas., 70..... 601
Bessex *v.* R. R. Co., 45 Wis., 477. 493
Birchard *v.* Booth, 4 Wis., 74..... 466
Blair *v.* Lanning, 61 Ind., 499.... 167
Boatman's Benev. Asso. *v.* Kribben, 48 Mo., 37..... 21
Bosworth *v.* Swansey, 10 Weet, 363 89
Brabbits *v.* R. R. Co., 38 Wis., 289 492
Brocaw *v.* Board, etc., 73 Ind., 533 169
Bryant *v.* Fairchild, 51 Me., 146.. 16
Buchanan *v.* Patterson & Co., 17 N. J., 75..... 279
Burker *v.* Kelsey, 72 Ind., 51..... 630
Burke *v.* Monroe County, 77 Ill., 610..... 162
Burton *v.* Wells, 30 Miss., 689... 11
Butler *v.* Wigge, 1 Saunders, 65... 196
Cadle *v.* Milwaukie, etc., R. R. Co., 44 Ia., 11..... 326
Cairo, etc., R. R. Co. *v.* People, 92 Ill., 170..... 250
Canal Co. *v.* Commonwealth, 10 P. T. Smith, 367..... 322

PAGE

Cardell *v.* N. Y., etc., R. R. Co., 75 N. Y., 330..... 633
Carrol *v.* Safford, 3 How., 441.... 406
Chamberlain *v.* Brown, 2 Doug., 120..... 385
Chicago, etc., R. R. Co. *v.* Donahue, 75 Ill., 106..... 472
——— *v.* Hunt, 30 Ia., 78 618
——— *v.* Harney, 28 Ind., 28..... 559
——— *v.* Moranda, 93 Ill., 302..... 532
——— *v.* McLellan, 84 Ill., 109.... 532
——— *v.* Parnell, 94 Ill., 448..... 629
Cincinnati, etc., R. R. Co. *v.* Chester, 57 Ind., 297..... 557
Clark *v.* Mitchell, 64 Mo., 564..... 407
Clark *v.* R. R. Co., 2 Am. and Eng. R. Cas..... 240
Clough *v.* Davis, 9 N. H., 500..... 87
Clayards *v.* Dethick, 12 Q. B., 439.. 632
Coates *v.* Gregory, 10 Ind., 345.... 351
Coloma *v.* Eaves., 92 U. S., 484.... 176
Coleman *v.* Southwick, 9 Johns., 45..... 563
Commonwealth *v.* Wilkinson, 16 Pick., 175..... 324
Coombs *v.* New Bedford Cordage Co., 29 Conn., 548..... 478
Craig *v.* Rochester, 38 N. Y., 404.. 278
Crispin *v.* Babbitt, 81 N. Y., 516... 522
Crocket *v.* State, 38 Ind., 416..... 42
Culp. *v.* Atchison, etc., R. R. Co., 17 Kans., 475..... 298
Cumberland, etc., R. R. Co. *v.* State, 44 Md., 283..... 582
Cummings *v.* Collins, 61 Mo., 520.. 479
Danville R. R. Co. *v.* Commonwealth, 28 P. T. Smith, 29..... 323
Davis *v.* Mayor of N. Y., 15 N. Y., 530..... 278
——— *v.* R. R. Co., 20 Mich., 105.. 487
DeGraff *v.* N. Y., etc., R. R. Co., 76 N. Y., 131..... 457
Delaware, etc., R. R. Co. *v.* Salman, 28 Am. Rep., 214..... 366

Digitized by Google

	PAGE
Devitt v. Pacific R. R. Co., 50 Mo., 302	613
Edgarton v. State, 67 Ind., 588	42
Elliott v. Fair Haven R. R., 32 Conn., 579	279
Emslie v. Young, 24 Kans., 782	438
Erlinger v. People, 36 Ill., 458	196
Evansville, etc., R. R. Co. v. Hiatt, 17 Ind., 102	639
Farnsworth v. Brunquest, 36 Wis., 202	293
Flagg v. Millburg, 4 Cush., 243	
Flanagan v. Chicago, etc., R. R. Co., 50 Wis., 462	478
Ford v. Fitchburg, etc., R. R. Co., 110 Mass., 240	532
Francis v. A., T. & S. F. R. R. Co., 19 Kans., 311	190
Fuller v. Jewett, 80 N. Y., 46	522
Fultz v. Wycoff, 25 Ind., 321	557
Franz v. Dietrick, 49 Mo., 95	21
Gelpeke v. City, 1 Wall., 175	238
General v. Metropolitan Co., 125 Mass., 45	279
Gillenwater v. Madison, etc., R. R. Co., 5 Ind., 486	582
Glasgow v. Hubbs, 52 Ind., 339	351
Gordon v. M. & L. R. R. Co., 52 N. H., 596	522
Haines v. Ill. Cent. R. R. Co., 41 Iowa, 227	589
Hamilton v. Annapolis R. R., 1 Mo., 553	396
——— v. Des Moines, etc., R. R. Co., 36 Ia., 81	624
——— v. Winterowe, 43 Ind., 393	408
Harper v. Indianapolis, etc., R. R. Co., 47 Mo., 567	562
Heirn v. Vogel, 69 Mo., 529	11
Hess v. Baltimore & Co., 52 Md., 242	279
Hewit v. Mason, 24 How., 366	466
Huffman v. Gordon, 15 Ohio, 212	553
Hildebrand v. Toledo, etc., R. R. Co., 47 Ind., 399	557
Hinckley v. Penobscot, 42 Me., 89	89
Hobert v. Milwaukee, 27 Wis., 194	279
Houk v. Barthold, 78 Ind., 21	169
Hough v. R. R. Co., 100 U. S. 213	493
Howland v. Eldredge, 43 N. Y., 457	157
Hridrews v. Lafferty, 1 Whart., 303	402
Hutton v. Windsor, 34 Upper Can., Q. B., 487	632
Humphreys v. Armstrong, 56 Pa., 204	632
Hunt v. Chicago, etc., R. R. Co., 26 Ia., 363	601
Isabel v. Hannibal, etc., R. R. Co., 60 Mo., 475	639
Indianapolis v. Indianapolis Home, 50 Ind., 215	276
Insom v. Mississippi, etc., R. R. Co., 36 Miss., 300	298
International R. R. Co., v. Doyle, 49 Tex., 190	479
Jersey City v. Bergen Co., 20 Divd.	279
Johnson v. Townsley, 13 Wall., 72	421
Jones v. Andover, 10 Allen, 18	89
——— v. Carnahan, 63 Ind., 229	166
Kansas Pacific R. R. Co. v. Dunmeyer, 24 Kans., 723	438
Kansas Central R. R. Co., v. Allen, 22 Kans., 286	362
Kelley v. Adams Co., 76 Ill., 101	196
Kent v. Fullenlove, 38 Ind., 522	166
Kielly v. Belcher Mining Co., 3 Sawyer, 437	479
Kimball v. Darling, 32 Wis., 675	466
King v. Iowa, etc., R. R. Co., 34 Ia, 455	366
——— v. Enterprise Ins. Co., 45 Ind., 43	349
Kinney v. Kiernan, 49 N. Y., 164	203
Koelle v. Knecht, 99 Ill., 396	252
Kreswson v. Cloud, 45 Ind., 273	403
Kroy v. Chicago, etc., R. R. Co., 32 Ia., 357	617
Ladd v. R. R. Co., 119 Mass., 412	462
Lake Shore, etc., R. R. Co., v. Lavalley, 36 Ohio, 221	582
Lanning v. R. R. Co., 49 N. Y. 521	492
Larken v. Junction R. R. Co., 33 Ohio, 150	537
Leavenworth, etc., R. R. Co. v. United States, 92 U. S., 733	410
Lehigh Valley R. R. Co. v. Lazarus, 28 Pa. St., 203	366
Lemke v. Chicago, etc., R. R. Co., 39 Wis., 449	474
Lippincott v. Town of Pana, 92 Ill., 24	141
Little Miami R. R. Co. v. Stephens, 20 Ohio, 416	536
Lincoln v. Iron Co., 103 U. S., 412	176
Lombard v. Chicago, etc., R. R. Co., 47 Ia., 494	593
Lucas v. Board, etc., 44 Ind., 424	276
McAunich v. Mississippi R. R. Co., 20 Ia., 338	601
McCool v. Smith, 1 Black., 459	178
McGatrick v. Mason, 4 Ohio, 566	479
McGowen v. St. Lawrence, etc., R. R. Co., 61 Mo., 528	612
McKean v. B. C. R. & N. R. R. Co., 7 N. W. Rep., 541	624
McKeever v. Ball, 78 Ind., 398	169
Marcy v. Township, 92 U. S., 637	176
Marshall v. Schriker, 63 Mo., 308	612
Martin v. People, 87 Ill., 524	162

Digitized by Google

	PAGE
Marquez v. Frisbie, 101 U. S., 473.	432
Meier v. Penn. R. R. Co., 64 Pa., 225.	17
Metropolitan R. R. Co. v. Chicago, etc., R. R. Co., 87 Ill., 317.	266
Michigan Air Line R. R. Co. v. Barnes, 44 Mich., 222.	
Middleport v. Ætna Life Ins. Co., 82 Ill., 568.	141
Milwaukee, etc., R. R. Co., v. Haines, 10 Kans., 439.	368
Morehead v. R. R. Co., 17 Ohio, 340.	398
Morris v. Gleason, 1 Bradwell, 510	479
——— v. Graves, 2 Ind., 354.	351
——— v. State, 31 Ind., 189.	42
Morrison v. Bucksport R. R. Co., 67 Me., 353.	86
Morton v. Nebraska, 21 Wall., 660.	432
Muldowney v. Ill. Cent. R. R. Co., 32 Ia., 176.	589
Mulhollin v. State of Ind., 646.	351
Murphy v. R. R. Co., 58 Ill., 336.	580
Myers v. Meunrath, 101 Mass., 366.	35
National Bank v. City of Elmira, 58 N. Y.	49
Nearns v. Harbert, 25 Mo., 352.	22
Newhouse v. Clarke, 60 Ind., 172.	569
Ney v. Dubuque, etc., R. R. Co., 20 Ia., 347.	601
Nichols v. State, 65 Ind., 512.	351
Ottawa Co. v. Nelson, 19 Kans., 237	190
Owen v. Owen, 22 Ia., 270.	589
Paradine v. Jane, Aleyn Rep., 26, 27.	15
Patchin v. Swift, 21 Vt., 298.	11
Patterson v. Chicago, etc., R. R. Co., 75 Ill. 588.	250
——— v. Pittsburg, etc., R. R. Co., 76 Pa. St., 389.	532
Patton v. North Carolina R. R. Co., 33 Pa., 426.	366
Pearse v. Pettis, 47 Barb., 276.	204
Peddicord v. Balt Co., 34 Md., 479	279
Peoria, etc., R. R. Co. v. Schertz, 84. Ill., 135.	250
Beltz v. Eichele, 62 Mo., 171 Leake, 735.	16
Penn. Coal Co. v. Conlon, 25 Mich. 274.	629
Pennsylvania Co. v. Holderman, 69 Ind., 18.	564
——— v. Sedwick, 59 Ind., 336.	557
People v. County of Tazewell, 22 Ill., 147.	196
——— v. Dutcher, 56 Ill., 144.	195
——— v. Davidson, 30 Cal., 379.	316
——— v. Glame, 70 Ill., 232.	196
——— v. Jackson Co., 92 Ill., 458.	141
——— v. Ken., 27 N. Y., 188.	278
People v. Mead, 36 N. Y., 294.	155
——— v. Mitchell, 35 N. Y., 551.	156
——— v. Ryder, 12 N. Y., 442.	466
——— v. Town of Santa Anna, 67 Ill., 57.	141
——— v. Vanderbilt, 26 N.Y., 287.	316
Perley v. Taylor, 21 Kans., 712.	133
Pittsburg, etc., R. R. Co. v. Ruby, 38 Ind., 294.	559
Pitzman v. Village, 92 Ill., 111.	162
Pond v. Wyman, 15 Mo., 183.	22
Powers v. Council Bluffs, 45 Iowa, 652.	55
Presbrey v. Old Colony, etc., R. R. Co., 103 Mass., 198.	298
Price v. Navigation Co., 46 Tex., 585.	547
Primm v. City of Belleville, 95 Ill., 142.	196
Putnam v. Valentine, 5 Ohio, 187.	316
O'Brieu v. Wetherell, 14 Kans., 622	440
Ohio, etc., R. R. Co. v. Tindall, 18 Ind., 366.	582
Ormond v. Holland Ellis, B. & E., 102.	479
Reed v. Northfield, 13 Pick., 94.	632
Reichart v. Felps, 6 Wall., 160.	432
Rice v. R. R. Co., 1 Black., 358.	407
Robinson v. Howe, 13 Wis., 341.	138
——— v. Railway Co., 46 Tex., 540	547
Rome v. Village, 19 N. Y., 20.	156
Rose v. Boston, etc., R. R. Co., 58 N. Y., 217	522
R. R. Co. v. McShane, 22 Wall., 444	407
——— v. Barler, 5 Ohio.	541
——— v. Barron, 26 Vt., 717.	496
——— v. Barber, 5 Ohio, 541.	473
——— v. Lewis, 33 Ohio, 196.	540
——— v. Keeley, 23 Ind., 133.	557
——— v. Tremont County, 9 Wall., 94.	416
——— v. Lovejoy, 8 Nev., 100.	395
——— v. Miller, 51 Tex., 274.	547
——— v. Prescott, 16 Wall, 603.	407
——— v. Stout, 17 Wall., 657.	560
——— v. Speer, 56 Pa., 326.	396
——— v. Smith, 9 Wall., 97.	416
——— v. United States, 92 U. S., 733.	438
Rutherford v. Greens Heirs, 2 Wheat., 196.	416
Ryan v. R. R. Co., 99 U. S., 382.	446
Schafer v. State, 49 Ind., 460.	564
Schlichter v. Phillipy, 67 Ind., 201.	60
Schmidt v. Pfiel, 24 Wis., 452.	466
Schroeder v. Chicago, etc., R. R. Co., 47 Ia., 375.	592
Schulenberg v. Harriman, 21 Wall., 44.	451
Schultz v. R. R. Co., 44 Wis., 638.	587

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PAGE
Secus v. East R. R. Co., 14 Allen, 433 532
Seymour v. Maddox, 16 Q. B., 326. 479
Shideler v. Clinton Township, 28 Ind., 479..... 168
Shopman v. R. R. Co., 9 Cush., 24 496
Simpson v. Boring, 16 Kans., 248. 439
Slaten v. D. V. R. R. Co., 29 Ia., 148..... 326
Sloan v. State, 8 Bekf., 361..... 276
Smith v. Bean, 15 N. H., 577..... 37
——— v. Oxford Iron Co., 42 N. J. L., 467..... 532
——— v. R. R. Co., 42 Wis., 526.. 580
——— v. R. R. Co., 42 Wis., 520.. 485
South Carolina R. R. Co. v. Blake, 9 Richardson, 229..... 396
Starin v. Town of Genoa, 23 N. Y. 439..... 155
State v. Brannin, 23 N. J. L., 484.. 276
——— v. Commissioners, 21 Kans., 419..... 189
——— v. Findley, 10 Ohio, 54..... 196
Steffen v. R. R. Co., 46 Wis., 265.. 486
Stetler v. R. R. Co., 49 Wis., 609.. 496
Stetson v. Chicago, etc., R. R. Co., 75 Ill., 74..... 250
St. Louis, etc., R. R. Co. v. Valarious, 56 Ind., 511..... 479
Stoghill v. C., B. and Q. R. R. Co., 43 Iowa, 26..... 55
Stout v. Hyatt, 13 Kans., 232..... 439
Street Ry. Co. v. Carmansville, 14 Ohio, 523..... 279
Strohlendorf v. Rosenthal, 30 Wis., 674..... 462
Sullivan v. India Mfg. Co., 113 Mass., 396..... 462
Supervisors v. Schenck, 5 Wallace, 772..... 180
Taylor v. Ficks, 64 Ind. 167..... 60
Terre Haute Co. v. Scott, 14 Ind. 29..... 278
Thayer v. St. Louis, etc., R. R. Co., 22 Ind., 26..... 559
Thomas v. City of Richmond, 12 Wall., 354..... 201
Tinney v. Columbus, etc., R. R. Co., 31 Ind., 174..... 479
Townsend v. Wilson, 9 Barr. (Penn.), 270..... 186

PAGE
Town of Concord v. Savings Bank, 92 U. S., 630..... 180
Town of Springport v. Teutonia Saving Bank, 75 N. Y., 397..... 156
Town of Venice v. Woodruff, 62 N. Y., 462..... 155
Town of Wellsboro v. N. Y., etc., R. R. Co., 76 N. Y., 185..... 155
Trandsen v. Chicago, etc., R. R. Co., 36 Iowa, 372..... 592
Trees v. Eakin, 9 Ind. 554..... 351
Troewert v. Decker, 51 Wis., 46.. 33
Tucker v. Ferguson, 22 Wall. 527. 451
Turner v. State, 67 Ind., 595..... 42
Turnpike Co. v. Pumphrey, 69 Ind., 78..... 557
Twitchell v. Conn, 7 Wall., 321... 407
Union Trust Co. v. Thomason, 25 Kans., 1..... 601
Wagner v. Gage Co., 3 Neb., 237.. 367
Walker v. R. R. Co., 39 N. Y., 468 487
——— v. Old Colony R. R. Co., 103 Mass., 16..... 86
Walsh v. Peet Valve Co., 110 Mass., 23..... 478
Warner v. R. R. Co., 44 N. Y..... 465
——— v. Fountain, 28 Wis., 412. 293
Wedgewood v. R. R. Co., 41 Wis., 478..... 492
Weischelbaum v. Cutlett, 20 Kans., 709..... 133
Wheeler v. San Francisco R. R., 31 Cal., 46..... 13
Whitaker v. Boylston, 97 Mass., 273..... 632
Wilkinson v. State, 59 Ind., 416... 42
Wilson v. Madison, etc., R. R. Co., 18 Ind., 226..... 582
Wiseman v. Wiseman, 78 Ind., 112 349
Wonder v. Baltimore, etc., R. R. Co., 32 Md., 411..... 479
Wood v. United States, 16 Pet., 342..... 178
Wright v. Bishop, 88 Ill., 303..... 141
——— v. Milwaukee, etc., R. R. Co., 25 Wis., 46..... 303
——— v. R. R. Co., 25 N. Y., 562 473
——— v. Sperry, 21 Wis., 331.... 138
Yawger v. Allen, 52 N. Y., 588... 157

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The Wiggins Ferry Company, Appellant,

v.

The Chicago and Alton R. R. Co.

(73 *Missouri Reports*, 389. *April Term*, 1881.)

A ferry company entered into a contract with a railroad company, whereby it granted to the railroad company a site for a depot and right of way, and the railroad company, on its part, agreed to give to the ferry company the ferrying of all goods required to be transported between certain points. The contract contained a provision authorizing its assignment, and stipulating that all its covenants should be binding on the assignee. An assignment was subsequently made on the express condition that the assignee should take subject to all the covenants. The contract had been entered into in the first instance at the request of the assignee and with a view to the assignment. *Held*, that while the assignee might not be bound by the covenant in relation to ferrying as a covanant running with the land, yet he was bound by virtue of the other stipulations, and was liable for a breach of such covenant.

A railroad company has power to contract with another corporation to complete the transportation of goods whose destination is beyond the terminus of its own line.

The ferry company having by its charter an exclusive right to ferry all freights passing either way between the city of St. Louis and the company's lands on the opposite (Illinois) shore of the Missippi River, entered into a contract with the railroad company, by which the railroad company agreed that it would "always employ said ferry company to transport across said river all persons and property which may be taken across the said river either way to or from the Illinois shore, either for the purpose of being transported on said railroad, or having been brought to said river upon said railroad, ... so that said ferry company shall have the profits of the transportation of all such passengers and property taken across said river either way, by said railroad company, and that no other than said ferry company shall ever, at any time, be employed by said railroad company to cross any passengers or freights coming or going on said road." Another clause of the contract declared that the object of the ferry company in making the contract was to secure to itself "the ferrying business between the Illinois and the Missouri shores opposite the city of St. Louis, of all the freights and passengers carried or to be carried" by the railroad company. *Held*, that the railroad company, by this contract, bound itself to employ the ferry company to transport all the freight and passengers it might have crossing either way between said city and the Illinois shore at any point opposite, and not merely such as it might have crossing between the city and the ferry company's lands, and for this purpose it bound itself to bring all its freights and passengers to the said ferry.

A railroad company requiring a ferry to complete the transportation of its freights and passengers at a terminal point, entered into a contract with a ferry company by which it bound itself to give all its ferrying business at that point to that company, and agreed not to employ any other. The ferry com-

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pany, on its part, agreed to "furnish and maintain wharf and steam ferry boats sufficient to do with promptness and dispatch all the ferrying of passengers and freight requiring it." *Held*, that this contract was not void as being against public policy, because it bound the ferry company to furnish all the facilities that the public interests required. Nor was it void as being in restraint of trade. Contracts are held void on this ground only when they operate a general restraint of trade. This contract was limited in its operation to a single place, and at that place did not wholly prohibit the ferrying business, but only limited it to one company.

Before a party who is enjoying the fruits of a contract can avoid liability thereunder on the ground that it is against public policy, he must make it clearly manifest that this objection is well founded, and must also restore to the other party all that he received as a consideration for the promise which he seeks to avoid.

A railroad company and a ferry company entered into a contract for the ferrying of persons and property by which the ferry company bound itself to "furnish and maintain wharf and steam ferry boats sufficient to do with promptness and dispatch all the ferrying of passengers and freight requiring it." At the time this contract was made all goods intended for transportation over this ferry were unloaded from the cars and placed on wagons. Subsequently a system of transferring loaded cars came into vogue. *Held*, that under this contract the railroad company had a right to demand of the ferry company that it adopt the new system. It was bound to adopt any improvements whereby transportation would be made cheaper, safer and more expeditious.

The court holds the contract of March 9th, 1866, between the Chicago and Alton R. R. Co. and the Madison County Ferry Company to have been made by the railroad company in fraud of the rights of the Wiggins Ferry Company under its contract of April 28th, 1864, with the railroad company.

A railroad company having entered into a contract with a ferry company for the ferrying of passengers and freights, afterward, with the fraudulent purpose of diverting traffic from the ferry and depriving the ferry company of the benefits of the contract, so arranged its business as to make it the interest of shippers to order their goods transferred by another ferry. *Held*, that under these circumstances the railroad company could not excuse its failure to deliver goods for ferrying according to the contract by showing that the shippers had ordered them sent by the other ferry.

The report of a referee is equivalent to a special verdict, and if there is evidence tending to establish the facts as found, it will not be disturbed on appeal as being against the weight of evidence.

The plaintiff, a ferry company, entered into a contract with defendant, a railroad company, whereby it bound itself at all times to keep sufficient ferry boats and appliances to do all the railroad company's ferrying, and the railroad company, on its part, bound itself to give all its ferrying to that company. The ferry company was prepared at all times to comply with the contract, but the railroad company gave its ferrying to another company. In an action for breach of contract; *Held*, that the profits on all the business thus diverted were the true measure of damages.

APPEAL from St. Louis Court of Appeals.

Reversed.

Glover and Sheplay for appellant.

1. The contract sued on is not limited to Bloody Island. Bloody Island comprises but a part of the Illinois shore opposite St. Louis. The contract binds the railroad company to give plaintiff all its

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ferryage for the whole length of the Illinois shore opposite St. Louis. The contract is valid unless some cause of invalidity is shown, and the burden of showing this is on the railroad company.

2. The contract is not *ultra vires*. The railroad company was authorized by its charter "to take, use and make arrangements for the transportation of freight and passengers carried or to be carried, upon said railroad, or otherwise, from Alton to St. Louis, Missouri, and for this purpose to construct, own and use such boat or boats as may be necessary." This statute extended the corporate franchise of the railroad company beyond its rail terminus on the Illinois shore to the city of St. Louis. That which a corporation has power to do, it is bound to do. Field Corp., §§ 500, 504; U. P. R. R. Co. *v.* Hall, 91 U. S. 343; King *v.* Severn, etc., R. R. Co., 2 B. & Ald. 646; Vincent *v.* R. R. Co., 49 Ill. 33; Mayor *v.* Marriott, 9 Md. 160. It was, therefore, bound to arrange for the transportation of its freights to St. Louis; and it was its duty to make some permanent and reliable arrangement. This it could not have done without agreeing to give all its ferriage to some one ferry company; for no company would go to the expense of equipping itself sufficiently to do the work without a guarantee of receiving the whole of it. If the power exists to enter into a contract, the terms of it are referred to the judgment and discretion of the corporation, and it is no more restrained than that of a natural person. Field Corp., § 246; Railroad *v.* Richmond, 19 Wall. 584; Western Bank *v.* Tallman, 17 Wis. 530; Argenti *v.* San Francisco, 16 Cal. 255; Blunt *v.* Walker, 11 Wis. 334; Richmond *v.* Dubuque, 26 Iowa, 191; Aikin *v.* Blanchard, 32 Barb. 527; Connecticut *v.* Cleveland, 41 Barb. 8. When a contract made in excess of corporate powers has been executed, the plea of *ultra vires* will not be heard. Field Corp., §§ 263 to 266, inclusive. The conveyance to the railroad of $130,000 real estate is an answer to such a plea in this case.

3. The contract is not void for being contrary to public policy. This is an objection on which judges proceed with caution. Davis *v.* Bank 2 Bing. 393; s. c., 9 Eng. Com. Law, 452. There is nothing in the contract that requires the railroad company to abandon any of its charter rights as to operating its road, running trains, locating stations or contracting to deliver freights. The evidence shows not only that it was no disadvantage to the public to have freights and passengers delivered by plaintiff's ferry, but that that was the shortest, cheapest and most expeditious route. Arrangements could have been made to transfer loaded cars by plaintiff's ferry, and if defendant had lived up honestly to its contract it would have asked that such arrangements be made, and they would have been made.

4. The station for car transfer at Venice was not the suggestion of public policy and public good, but was a cunning contrivance of

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the railroad company to excuse its violation of the contract. The evidence abundantly shows this.

5. The railroad company, having a carrying franchise, which it is bound by its charter to exercise to and from St. Louis, cannot inject a connecting line between its termini in avoidance of any of its duties or liabilities. But if the case is one for the existence of a connecting line, the contract entered into with the Wiggins Ferry Company to transport its freights beyond its terminus as a connecting line is a valid contract, which it is bound to perform. Railroads have power to contract for transportation beyond their termini and upon connecting lines. Wheeler *v.* San Francisco, 31 Cal. 46; Bank *v.* Augusta, 49 Me. 507; Shawmut Bank *v.* Plattsburg, etc., 31 Vt. 491; Morse *v.* Brainerd, 41 Vt. 550; Hutchinson Carriers, 147, 148, 149, 150, 151. The power to carry beyond its lines entitles the railroad to make a valid contract for the purpose. Schroeder *v.* Hudson, 5 Duer, 55.

6. The plaintiff was not bound to provide car transfer for defendant without request. The railroad company sets up a plea that the plaintiff did not provide car transfer, and this released it from the contract. Sometimes it puts an objection thus: The contract did not provide for car transfer, and therefore, defendant had no right to it. Neither objection is good. If a contract is valid when made, a change in the conditions of business will not make it invalid. 19 Wall. 584; The Dubuque, etc., *v.* Richmond, etc., 16 Wall. 678. If this was not so, no contract would long be valid. If a discovery in art or science, invention of a motive power, a new application of a known power, or any improvement in methods of doing business would avoid a contract, no contract would long be valid. The world moves, but forms are not essentials. Public institutions, or quasi public institutions or instrumentalities, are specially bound to keep abreast with the progress of events, so far as to avail of all tried successful improvements adopted in use. Not only may they do it, but they may be compelled to it, and will be held guilty of negligence if they fail to do it. Steinweig *v.* Erie Ry. Co., 43 N. Y. 123; Levering *v.* U. T. Co., 42 Mo. 88; New Jersey, etc., *v.* Merchants' Bank, 6 How. 344; Empire T. Co. *v.* Wamsutta, etc., 63 Pa. St. 14; Hutchinson on Carriers, § 529; Meier *v.* R. R. Co., 64 Pa. St. 225; Hegeman *v.* R. R. Co., 16 Barb. 353; St. Louis, etc., *v.* Gilham, 39 Ill. 455. Notwithstanding, it is evident that in the initial period of introducing an improvement, a carrier has no right to immediately force it upon the public. When the case is one of contract, as that now under consideration, the concurrence of both parties is needful; and if one of them refuses to concur, denies the right and power of the other party to make the improvement for him, and will not have it made for him, he will not be allowed to complain it was not made for him,

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nor should he in such case claim a release from his contract, according to old methods.

7. The contract is not void, as being in restraint of trade. There is no element of a restraint of trade in it. It was the duty of defendant to carry their passengers and freights to and from St. Louis. It was bound to make some arrangement to that end. We do not see that any wiser or better one could have been made. We have no evidence that any other could have been made. To agree to deal with one person was never held to be a restraint of another's trade. Jones *v.* Edney, 3 Camp. 285; Morris *v.* Colman, 18 Ves. 437. The restraint to make a contract void, must be a general prevention of some one's trade, not limited in space. Pierce *v.* Fuller, 8 Mass. 223; Hayward *v.* Young, 2 Chitty, 407; Davis *v.* Mason, 5 T. R. 118; Hitchcock *v.* Coker, 6 Ad. and Ellis, 455; Bunn *v.* Guy, 4 East, 190; Perkins *v.* Lyman, 9 Mass. 522; Rannie *v.* Irvine, 7 Man. and Gr. 969; Dunlop *v.* Gregory, 10 N. Y. 241; Palmer *v.* Stebbins, 3 Pick. 188; Warren *v.* Jones, 51 Me. 146; Alger *v.* Thacher, 19 Pick. 51; Bowser *v.* Bliss, 7 Blackf. 344; Bradley *v.* Denton, 3 Wis. 557; Costigan *v.* Mohawk, 2 Denio, 610; Shannon *v.* Comstock, 21 Wend. 457; Dean *v.* Ritter, 18 Mo. 182; Bailey *v.* Damon, 3 Gray, 92; Leeman *v.* Lloyd, 14 L. J. (N. S.) 165; Presbury *v.* Fisher, 18 Mo. 50; Richmond *v.* Dubuque, 34 Iowa 422; s. c., 26 Iowa, 191.

8. The Chicago and Alton R. R. Co. is bound by the contract of 1864, as fully as the Alton and St. Louis R. R. Co. was bound by it. Burton *v.* Wells, 30 Miss. 689; Attix *v.* Pelan, 5 Clarke (Iowa), 336; Goodwin *v.* Gilbert, 9 Mass. 510; Guild *v.* Leonard, 18 Pick. 511; Pike *v.* Brown, 7 Cush. 133; Aikin *v.* R. R. Co., 26 Barb. 289; Stow *v.* Wyse, 7 Conn. 214; Davis *v.* Callaway, 30 Ind. 112; Felton *v.* Dickinson, 10 Mass. 287.

9. The plaintiff was entitled as damages to the full ferriage rates of all freights to which plaintiff was entitled under the contract, and which plaintiff was not employed to ferry. Greene *v.* Waggoner, 2 Hilton, 297. The plaintiff was employed to work for a specified period; and being dismissed without fault, before the end of the time, was entitled to recover the full contract price, defendant failing to show the plaintiff could have got other employment. King *v.* Steiren, 44 Pa. St. 99; Pond *v.* Wyman, 15 Mo. 175; Nearns *v.* Harbert, 25 Mo. 352; Little *v.* Mercer, 9 Mo. 218; Ward *v.* Ames, 9 John. 138; McDaniel *v.* Parks, 19 Ark. 671; Armfield *v.* Nash, 31 Miss. 361; Costigan *v.* Mohawk, 2 Denio, 610; Ashburner *v.* Balchen, 7 N. Y. 262; Webb *v.* Coonce, 11 Mo. 9. One who agrees to furnish cargo, and fails, must pay damages. Puller *v.* Staniforth, 11 East, 232; Dubuque *v.* Richmond, 26 Iowa, 191; Medbery *v.* Sweet, 3 Chand. (Wis.) 231. In such a case as this there is no mitigation of damages for what

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plaintiff could have made. The plaintiff's boats are not general boats—are confined to a ferry business. They cannot go abroad in search of other freights. They can only run from shore to shore —run empty if freights are not offered. Every expense of time, labor and money was incurred to carry the defendant's freights, and plaintiff was entitled to full ferry rates.

James O. Broadhead, for respondent.

1. To what did the contract extend? (a) Plaintiff did not agree to transfer any cars over the river. No such thing had ever been done, nor was there any provision for its being done. On the contrary, plaintiff, by the contract, reserved a space 260 feet wide between defendant's depot grounds and the river for a wharf; and over this defendant could not lay a track, so that its cars could not reach plaintiff's boats. (b) The plaintiff did not contract, and could not contract, to perform ferry service outside of and beyond the point or locality at which it could operate its ferry or perform such service. Such a contract would have been ultra vires and void; consequently the railroad company only contracted as to ferrying to be done at the point of plaintiff's ferry, or within its locality. Venice is outside of that locality. Plaintiff's charter being perpetual, its grant of franchises must be strictly construed. It must be confined to the powers expressly given it, withholding all others, to be used for the public good, as other demands arise, and as other, cheaper, improved or more convenient modes of transportation may be demanded. This rule of construction applies to the kind and mode of ferriage contemplated, and to the place or locality contemplated at which the ferry service was contracted for, as well as the extent and nature of all other stipulations of the contract. St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 133; Bridge Proprietors *v.* Hoboken, 1 Wall. 117, 124, 146; Thompson *v.* R. R. Co., 3 Sanf. Ch. 625; McRee *v.* R. R. Co., 2 Jones L. (N. C.) 186. If the contract is not confined to the locality of plaintiff's ferry, then it may be made to apply to Alton or any other point on the river, as well as Venice, or the Madison County ferry. If the contract is not confined to the mode of ferrying in use at its ferry, and the only mode which, by the terms of the contract, could be exacted of it, or indeed could be used, then it would extend to transportation by the bridge, a tunnel, or any other improved mode of crossing the river, forever, for the contract is perpetual. (c) The railroad company did not, by the contract, agree to become a procurer, runner, or drummer for the ferry company—to procure and control for it the ferriage of all persons and property which might come or go over the road to or from St. Louis by any route. The covenant is to employ plaintiff's ferry, and not to employ any other. This, of course, implies the power to employ—in other words, refers to such ferriage as should be under the control of defendant, and necessarily excludes

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the idea of procuring the ferriage from such persons as were not disposed to have their freight transported over plaintiff's ferry. Therefore, where shippers directed their freight to be transported over the Madison County ferry, or to be sent to St. Louis via Venice, the defendant might permit it to be done, and was authorized to discharge the freight at Venice to be transported over the river by the Madison County ferry.

2. The contract, as plaintiff claims, and must necessarily claim it to be (on the theory of this action), is ultra vires—vicious, against public policy, and void. (a) Contracts made by individuals and private corporations in restraint of trade, which are general, are void. The true test is, whether the restraint is such only as to afford fair protection to the parties, or whether it is so broad as to "interfere with the interests of the public." Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; s. c., 8 Am. Rep. 159; Crawford *v.* Wick, 18 Ohio St. 190; Bennett *v.* Dutton, 10 N. H. 481; White *v.* Hunter, 23 N. H. 134; Weld *v.* Lancaster, 56 Mo. 453; Skeels *v.* Phillips, 54 Ill. 315; Van Dyck *v.* Hewitt, 1 East, 96. (b) Much more rigid is the rule in regard to common carriers, such as the owners of ships, steamboats and other crafts, the proprietors of stage coaches, etc. On becoming common carriers, they assume higher obligations to the public. If a common carrier finds that an improved mode or route is provided, by which he may secure cheaper transportation, more conveniently and readily serve the public, or meet the increased demand for trade or travel, it is his highest duty to do so; and if a third person has made a contract with him, by the terms of which he would be hindered therefrom, such contract is at war with the best interest of the public, tending to prevent the common carrier meeting his first and highest obligations, and to influence and restrain him in the discharge of duties resting upon him by operation of law. The parties to such a contract are in pari delicto; the contract will not be enforced for or against either. (c) Railroad companies owe a still higher duty to the State and the public, in return for the bounty of the State in granting to them a part of its own sovereignty—the right of eminent domain. Peoria, etc., Co. *v.* Coal V. M. Co., 68 Ill. 489; s. c., 12 Am. Law Reg. (N. S.) 277; Marsh *v.* R. R. Co., 64 Ill. 414; s. c., 12 Am. Law Reg. (N. S.) 390; s. c., 16 Am. Rep. 564; Chicago, etc., R. R. *v.* People, 56 Ill. 366; Pacific R. R. *v.* Seely, 45 Mo. 212; New Eng. Ex. Co. *v.* R. R. Co., 57 Me. 188; s. c., 2 Am. Rep. 31; State *v.* R. R. Co., 29 Conn. 538; Thomas *v.* R. R. Co., 101 U. S. 71; York, etc., R. R. Co. *v.* Winans, 17 How. 30. These cases settle the law that contracts by railroad companies, which might affect their decision or action in the discharge of their duties to the public, and which might prevent the free and unbiassed discharge of their duties to the public in any respect, from time to time, are ultra vires, vicious and void.

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The construction given to the contract in question by plaintiff, and upon which it asks to maintain the action, is, that the railroad company covenanted that no other ferry or persons than plaintiff should ever be employed, and no other means used by which persons or property should be transported to or from the city of St. Louis than plaintiff's ferry—claiming that the railroad company has thus bartered away its powers and its corresponding duties to use all proper efforts from time to time to accommodate the increasing demand of trade and travel upon its road, and has bargained that the public, in using its road, should not have the cheapest, most convenient and most desirable mode of transit across the river, to and from St. Louis. Upon this construction alone does the plaintiff claim any breach of the contract. There is no complaint that any persons or property have been crossed over the river, going to or coming from defendant's road, at the point of plaintiff's ferry, by any other means than plaintiff's ferry. The claim is, that the demands of trade and shippers requiring the transfer of cars in bulk to and from St. Louis, defendants permitted such transfers, when required by its patrons, to be made at the Madison County ferry. The construction given to the contract by the plaintiff is, that in thus serving the public, in permitting the transfer of property in cars in bulk when required by shippers, by a ferry beyond the limits of the plaintiff's franchise, there is a breach of the contract, claiming that defendant contracted that it never would permit any transfer of persons or property across the river, to or from St. Louis, at any other point than the plaintiff's ferry, or in any other mode than that which the plaintiff might use. Thus construed, this contract is more flagrantly vicious than any of those passed on in the cases cited above.

John M. Woodson, also for respondent, argued, 1st, That the exceptions to the referee's report were good and sufficient, and should not have been disregarded as being too vague or indefinite; and, 2d, That the report is not sustained by the evidence. Upon the first point he cited Edwards on Referees, 149, 17, 14; Scranton *v.* Baxter, 4 Sandf. (S. C.) 5; Levert *v.* Redwood, 9 Port. 80; Neil *v.* Billing, 1 Dickens, 93; Butler *v.* Truslow, 55 Barb. 294; Finch *v.* Parker, 49 N. Y. 1; Watson *v.* Campbell, 28 Barb. 421; Roberts *v.* Carter, 28 Barb. 462; Green *v.* Brown, 3 Barb. 119; Frost *v.* Smith, 7 Bosw. 108; Hatch *v.* Fogerty, 7 Robt. 488; Mayor *v.* Erben, 10 Bosw. 189; s. c., 24 How. Pr. 358; Magie *v.* Baker, 14 N. Y. 438; 1 Tidd's Prac., 570, 571; Ib. Appendix, CXXII, § 47; Hawkins *v.* Bradford, 1 Caines, 160; Edwards on Referees, 129, 142; Wag. Stat., 1041, §§ 17, 18; Perry *v.* McGuire, 31 Mo. 287; Brooks *v.* Christopher, 5 Duer, 216; Dainese *v.* Allen, 14 Abb. Pr. (N. S.) 363; Cowen *v.* West Troy, 43 Barb. 48; Hunt *v.* Bloomer, 13 N. Y. 341; Lefler *v.* Field, 50 Barb. 407; Newell *v.* Doty, 33 N. Y. 83; Wheeler *v.* Billings, 38 N. Y. 263; Branger *v.* Cheva-

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lier, 9 Cal. 353; Johnson *v.* Whitlock, 13 N. Y. 345; Lawrence *v.* Fowler, 20 How. Pr. 407; Ketchum *v.* Clark, 22 Barb. 320; Rogers *v.* Beard, 20 How. Pr. 98; Austin *v.* Ahearne, 61 N. Y. 11; 2 Dan. Ch. Prac. (Perk. Ed. 1865), 1314; Adams *v.* Claxton, 6 Ves. 226; Bick *v.* Motly, 2 M. & K. 312; Brodie *v.* Barry, 1 Jack. & Walk. 450; Ottey *v.* Pensam, 1 Hare, 322; Massey *v.* Moss, 1 Hare, 319; East *v.* East, 5 Hare, 345; Ballard *v.* White, 2 Hare, 158; Ashton *v.* Lord Langdale, 20 L. J. Eq. 234; Daubeny *v.* Coghlan, 12 Sim. 507; McMahon *v.* Burchell, 1 Coop. 470; In re Rowland, 1 Chan. App. 421; Davidson *v.* Thirkell, 3 Grant Ch. 331; Shore *v.* Coons, 24 Mo. 556; Ely *v.* Ownby, 59 Mo. 437; O'Neill *v.* Capelle, 62 Mo. 203.

C. Beckwith, also for respondent.

1. The contract did not preclude the respondent from transporting railway cars, loaded with freight or occupied by passengers, to or from the shore to the river, or from employing others to do so, nor from ferrying, or employing others to ferry in any mode between places where the appellant had no ferry, and had no right to have one, nor did the agreement preclude the respondent from employing any ferry service not in existence when the agreement was made, and which the appellant did not agree to perform, and has never been able to perform. Mildmay *v.* Standish, Croke Eliz. 35; Hewitt *v.* Painter, Bulstrode, 175; Proprietors, etc., *v.* Hoboken Co., 1 Wall. 116; s. c., 13 N. J. Eq. (2 Beasley) 81.

2. The Circuit Court erred in holding that the contract precluded the respondent from transporting persons and property, from employing others so to do, between places to and from which the appellant had no legal right to transport the same, and that such construction of the contract would not render it void as against public policy. Fuller *v.* Dana, 18 Pick. 472; Pacific R. R. Co. *v.* Seeley, 45 Mo. 212; P. & R. I. R. R. Co. *v.* Mining Co., 68 Ill. 489; Marsh *v.* Fairbury R. R. Co., 64 Ill. 414; State *v.* Hartford & N. H. R. R. Co., 29 Conn. 538; Raphael *v.* Railway Co., L. R., 2 Eq. Cas. 37; Bank *v.* Adams Ex. Co., 93 U. S. 174.

3. The Circuit Court erred in holding that the contract sued upon obliged the respondent not to transport across the river, to or from Venice, cars laden with freight, and that such construction of the contract would not render it void as an unreasonable restraint of trade. Oregon S. N. Co. *v.* Windsor, 20 Wall. 64.

4. Appellant cannot maintain an action at law against respondent for the non-observance of those provisions of the contract requiring the employment of appellant, and the non-employment of others. A covenant to do or refrain from doing an act, not affecting the mode of enjoyment, nor the value of the land demised, is a personal one and does not bind the assignee. Mayor of Congleton *v.* Patterson, 10 East, 130; Flight *v.* Glossopp, 2 Bing. (N. C.) 125;

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Masury v. Southworth, 9 Ohio St. 348; Wiggins F. Co. v. O. & M. R. R. Co., 94 Ill. 83; 2 Platt on Leases, 400.

NORTON, J.—Upon the trial of this cause in the circuit court plaintiff obtained judgment for the sum of $107,255.40, from which defendant appealed to the St. Louis court of appeals, where the said judgment was reversed, from which plaintiff has appealed to this court.

The action of plaintiff is for the recovery of damages for alleged breaches of a contract entered into between plaintiff and the Alton & St. Louis R. R. Co. on the 28th day of April, 1864, which contract, on the day it was executed, was assigned to the Chicago & Alton R. R. Co., the defendant in this suit. The questions decisive of the case and presented by the record for our determination are: 1. Is the defendant, as assignee of the contract sued upon, liable to an action by plaintiff for any breach of it? 2. Is the contract ultra vires, condemned by public policy, or in restraint of trade? 3. Does the contract obligate plaintiff to transfer passengers and freight brought to its boats loaded in cars, as well as passengers and freight loaded in omnibuses, wagons, drays, etc.? 4. Was error committed in not receiving as evidence certain way bills and manifests offered by defendant? 5. Did the court err in overruling defendant's exceptions to the report of the referee or in refusing to set it aside? 6. Was the right rule applied in the measurement of damages?

It is claimed by counsel, that as plaintiff and the Alton & St. Louis R. R. Co. were the only parties executing the contract sued upon, no liability attached to defendant, the Chicago & Alton R. R. Co., as the assignee of the contract, upon the covenants therein contained, because such covenants do not run with the land, but are simply collateral thereto. If nothing else appeared but the fact that the Alton & St. Louis R. R. Co., which acquired rights in the lands mentioned in the contract, had assigned the contract to defendant, the rule invoked by counsel might be held to apply; but in the light of other facts disclosed by the record it is inoperative in this case.

From an averment made in the petition, and not denied by the answer, the fact appears that the contract in question was entered into by the Alton & St. Louis R. R. Co. at the special request of the Chicago & Alton R. R. with an agreement then perfected between the said two companies, that it should be assigned to defendant. The fact also appears on the face of the contract that it provides in express terms that the "Alton & St. Louis R. R. Co. shall have the right to transfer and assign this agreement to the Chicago & Alton R. R. Co., in which event all the covenants, stipulations and agreements herein above contained, shall be as binding on the Chicago & Alton R. R. Co. as the same are now on the Alton & St. Louis R. R. Co." It further appears that in pursuance of the

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above stipulation the contract was assigned to defendant on the same day it was executed, which assignment is attached to the contract, and expressly provides that defendant was to take it "subject, nevertheless, to the rents and covenants in said agreement contained." The acceptance by said defendant of said contract under this assignment, which is made in conformity with the terms and on the very condition on which plaintiff assented it might be made, fixes the liability of defendant. This has been expressly decided in the case of Heim *v.* Vogel, 69 Mo. 529, where it was held that if B, as grantee, accepts a deed from A containing a recital that the property was conveyed subject to a deed of trust made to secure a debt to C, and that B assumed or agreed to pay the same, the effect of such recital was to make the debt due to C the debt of B, and render B personally liable therefor; that by the acceptance of the deed a duty is imposed upon B, and the law implies a promise that he will perform it, on which, in case of failure, assumpsit will lie. To the cases cited in the opinion in the above case, sustaining the principle announced, the following may be added: Aikin *v.* The Albany R. R., 26 Barb. 289; Patchin *v.* Swift, 21 Vt. 298; Attix *v.* Pelan, 5 Clark (Iowa), 336; Burton *v.* Wells, 30 Miss. 689. The liability of the defendant, the Chicago & Alton R. R. Co., being thus established, for any failure to comply with the stipulations of the contract, we will speak of it, in what is hereafter said, as a party to it.

Is the contract ultra vires, condemned by public policy or in restraint of trade? The solution of this question involves a consideration of the powers and relations of the two corporations making the contract, as well as a construction of the contract to ascertain the obligations it imposed on the respective parties. The fact that the Chicago & Alton R. R. Co., by virtue of its charter and various acts of the legislature of the State of Illinois (which it is unnecessary here to recite), was invested with rights and charged with the duties of a common carrier in the carriage of persons and property to, from and between its terminal points, viz.: Chicago and a point on Bloody Island, on the Illinois shore of the Mississippi River, opposite the city of St. Louis, is not controverted. Without reviewing the various acts of the legislatures of the States of Illinois and Missouri relatingto the incorporation of the Wiggins Ferry Company, it will be sufficient to say that they gave it the privilege of operating a ferry over the Mississippi River between the city of St. Louis and the Illinois shore of said river opposite said city, the said company being restricted to keeping a ferry or ferries at any point or points on the lands owned by the company on the Illinois shore, with the right to remove the same from place to place on said lands as necessity or convenience might require.

Before the railroad company could exercise the rights conferred or discharge the duties imposed upon it by its charter, it was indis-

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pensably necessary for it to acquire, either by condemnation or contract, a right of way for its tracks and grounds for a depot and other purposes incident to its business; and to accomplish these ends it had the power to contract with the owner of the land which it desired to appropriate to such uses. The Wiggins Ferry Company owned the desired lands, and under its charter had the power to dispose of them by contract, and also to contract for the ferrying of persons and property going to or coming from St. Louis over the Mississippi River. The contract in suit, which grew out of these relations existing between the parties to it, declares that the object sought to be accomplished by it and prompting its execution were two, viz.: First, to secure permanently to the Wiggins Ferry Company "the ferrying business between the Illinois and the Missouri shore opposite the city of St. Louis of all the freights and passengers carried or to be carried by the Alton & St. Louis R. R. Co., and the further sum of $2500 per annum to be paid by the said railroad company." Second, to secure to the Alton & St. Louis R. R. Co. "proper facilities for depot grounds for the operation and doing of the business of their road at a western terminus on the Mississippi River opposite to the city of St. Louis. That both plaintiff and defendant had the right to secure to themselves respectively by contract these objects we think is clear, and we cannot, therefore, declare from anything appearing on the face of the contract that it is ultra vires, but must hold it to be valid, unless it is shown, either by the contract itself or by extrinsic evidence, that they so contracted in securing these objects as to impose obligations on themselves which are either against public policy, or in restraint of trade, or which involve an abandonment of some duty which is due the public from the party obligated, in which event it would be our duty to declare it void.

None of these objections apply to the provisions of the contract transferring to defendant rights in lands of the Wiggins Ferry Company, whereby defendant acquired interests therein which enabled it fully and completely to accomplish the object it had in view in entering into the contract to rent depot grounds on Bloody Island and a right of way from the east end of said depot grounds northwardly toward the town of Brooklyn; nor do they apply to the obligation of plaintiff, whereby it bound the Wiggins Ferry Company "to furnish and maintain good and convenient wharf boats and steam ferry boats to do, with promptness and dispatch, all the ferrying required for the transit of passengers and freight coming from or going to said railroad (or the assignee hereinafter mentioned) over the river."

When the fact is considered that defendant, with one terminus of its road at Chicago, and the other at a point on the Illinois shore of the Mississippi river opposite the city of St. Louis, was necessarily dependent, for the successful operation of its road and business,

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on the facilities which it might afford for the passage over said river of persons and property destined either for St. Louis or points beyond—or coming to it from St. Louis destined either to Chicago or to points intermediate and beyond, it was in the interest not only of defendant, but of the public, that it should secure to itself these facilities. That these facilities were secured to defendant by the contract in question cannot be controverted, and that it had the power to make the contract by which it secured them is shown by Hutchinson on Carriers, section 145, and following sections, and by the case of Wheeler *v.* San Francisco R. R. Co., 31 Cal. 46, where the authorities sustaining the power are extensively cited.

But it is insisted that defendant, in securing them, obligated itself to do what is forbidden by public policy, and what is in restraint of trade, by agreeing that it "will always employ the said ferry to transport across said river all persons and property which may be taken across the said river either way to or from the Illinois shore, either for the purpose of being transported on said railroad or having been brought to the said river Mississippi, upon said railroad, so that said ferry company shall have the profits of the transportation of all such passengers, persons and property taken across said river either way by the said railroad company, and that no other than the Wiggins Ferry shall ever, at any time, be employed by the said party of the second part, or the assignee herein mentioned, to cross any passengers or freights coming or going on said road." Keeping in view the fact expressed in the contract that one object in making it was to secure to plaintiff "the ferrying business between the Illinois shore and the Missouri shore opposite St. Louis of all passengers and freight carried, or to be carried," by defendant, and that the above stipulations were inserted to carry out this object, and construing the contract in its entirety, giving to the words employed therein their usual signification, without twisting them from their natural meaning in the relation they bear to the object referred to, we are of opinion that defendant bound itself to give to plaintiff for ferrying over the Mississippi river all passengers and freight brought by it to the Illinois shore opposite the city of St. Louis to be crossed over to said city, and all passengers and freight taken from St. Louis for carriage by defendant on its road northward.

If the design of the contracting parties had been to limit the obligation of defendant to give to plaintiff for ferrying, and limit the right of plaintiff to have for ferrying only such freight as might go or come over Bloody Island, it should have been so expressed, and it could have been unmistakably expressed by the simple addition of the words "Bloody Island" to the words "river and Illinois shore," where they occur in the above recited clauses of the contract. This was not done. No words restricting the obligation of defendant to furnish freights for ferrying, or restricting plain-

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tiff's obligation to ferry only such freights as might go or come to the Illinois shore over Bloody Island, are to be found in the contract, and we are not authorized by any rule to interpolate or insert in the contract words which the contracting parties themselves not only did not put there, but which, as we think, were intentionally omitted. The Wiggins Ferry Company, by virtue of its charter, and independent of the contract, had the exclusive right to ferry freights across the Mississippi River to and from Bloody Island, and the construction contended for by counsel, that the contract secured to plaintiff the right to demand of defendant only such freight as it might bring to a point on Bloody Island, would involve the unreasonable conclusion that plaintiff was willing to transfer, and in fact did transfer to defendant property rights estimated by one witness to be of the value of $130,000, to secure to itself a right which it already had and of which defendant could not deprive it.

If the contract is to be viewed in the light of the circumstances surrounding the parties at the time of its execution, the construction we have given it is fortified and sustained. It is shown by the evidence that at the time it was entered into there were three ferry companies doing business under their respective charters from the Illinois shore opposite St. Louis, viz.: The St. Clair County Ferry, south, and the Madison County Ferry, north of the Wiggins Ferry Company. According to the evidence of Mr. Bisdom, the Wiggins Ferry Company had a frontage on the Illinois shore of said river opposite St. Louis of about two and a half miles; this frontage included not only Bloody Island, but also extended south of it and north of it up to or near the line dividing the counties of St. Clair and Madison, and within 3200 feet, or about five-eighths of a mile, of the Madison County Ferry at the town of Venice. The Wiggins Ferry Company had, by its charter, the exclusive privilege of maintaining and operating a ferry to and from any point or points on this frontage, and the other two the same right confined to the frontage on said shore respectively owned by them. On the other hand defendant had the right to give to either of these companies the ferrying across said river brought by it to the Illinois shore. If it brought its freight to said shore at any point embraced within the said frontage of plaintiff, if passed over the river from such point, it could only be done by plaintiff, and if brought to said shore at any point embraced within the limits of either the St. Clair County Ferry or Madison County Ferry, if passed over the river from such point, it could only be done by the company in whose limits such point was embraced. In this condition of things there was no possible motive or inducement for the Wiggins Ferry Company to enter into a contract by which it would get nothing more than it already had a right to. The right of said company to ferry freight from so much of the Illinois shore as was

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included in its frontage having already been secured to it by its charter, its evident purpose was to obligate defendant to bring to such frontage all freight carried by it requiring ferry transportation across the said river opposite St. Louis, and that such was the extent of the obligation assumed by defendant, we have already seen.

If, as argued by counsel for plaintiff and conceded by counsel for defendant, the Chicago and Alton R. R. Co. was authorized by its charter to carry passengers and freight to St. Louis, and empowered to employ and use boats for that purpose, it was its duty to do so, and the public had a right to demand of defendant the performance of this duty in such manner as not to hamper trade, but so as to secure the transit over the river with facility and dispatch of all persons and property which either trade or the public interest might demand. This much, and no more, the public had a right to demand, and if it was met by the contract in question it cannot be held to be in contravention of public interest, because the public would get under it all that it had a right to. It was no concern of the public what particular ferry should be employed by defendant as an instrumentality for the prompt passage over the river of all freight and passengers requiring such transit, provided the one employed was in all respects sufficient to accomplish such purpose without imposing any additional burdens on the shipper. The obligation of plaintiff required it to "furnish and maintain wharf and steam ferry boats sufficient to do with promptness and dispatch all the ferrying of passengers and freight requiring it." What more than this could be demanded? What right of the public was disregarded by defendant agreeing always to employ a company which it had thus obligated?

If on the other hand the southern terminus of defendant's road was an Bloody Island, it owed no duty to the public to carry freight or passengers beyond such terminus, and in making the contract in question it neither abandoned nor violated any duty to the public, because it owed it none. While defendant could not be compelled to carry beyond the terminus of its line, it nevertheless might contract, if it chose to do it, for the carriage of freight beyond such terminus, and for this purpose make a valid contract with a connecting carrier, and if it elected to make such contract it would be bound by it. Hutchinson on Carriers, §§ 147, 151, and authorities there cited; Ib., § 317; Paradine *v.* Jane, Aleyn Rep., 26, 27.

The only element of restraint of trade to be found in the obligation of defendant, is that it will never employ any other ferry but the Wiggins Ferry to transport freight from the Illinois shore, opposite the city of St. Louis, or sent to it from said city. This restriction is not general as to space, but only partial and special, and it is only when a contract is granted for general restraint of trade that it will be held illegal and void; but it is otherwise if the restraint be partial and reasonable. Bowser *v.* Bliss, 7 Blackf. 344;

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Peltz et al. *v.* Eichele, 62 Mo. 171; Leake on Con., pp. 735, 736. The space in which the restriction is to operate is limited to the Illinois shore, opposite the city of St. Louis, and is only a partial restraint in that space, the restriction being not that defendant will not employ any ferry at all, but that it will only employ that of plaintiff. We cannot say from anything appearing in the contract that such limitation is unreasonable, and it is not, therefore, obnoxious to the rule.

While holding the contract, as we have construed it, to be valid, yet if it is shown by extrinsic evidence to be in conflict with public policy, to that extent it must yield and give way, and it is for the defendant affirming it to be so, to show it. The salutary rule that a contract against public policy or interest will not be enforced, was adopted to conserve the best interests of society and the state, and a party who invokes it as a shield behind which to hide and protect himself against the damages attachable to the breach of a contract, especially when such party is in the full and free enjoyment of all the fruits of the contract, must make it clearly manifest to the mind of the court that the obligations imposed by it are condemned by the rule. In the case of Bryant *v.* Fairfield, 51 Me. 146, it was held that it is not for a party who retains the consideration of the contract, to invoke the rule that the contract is against the policy of the law. While not willing to go to the extent of that case and say that a party in the enjoyment of all he was to get in consideration of a promise made by him to another, should not be allowed, when sued for a breach of such promise, to plead that it was against public policy, we may safely say, without infringing upon any rule of common honesty, justice or right, that to make such plea effectual, he should restore, or be required to restore, all that he received as a consideration for the promise which he thus seeks to avoid. The fact that defendant entered into the possession of the lands it was to get under the contract immediately after its execution, laid its track, built its depot, and has ever since had the full and uninterrupted enjoyment of the same is conceded; the fact that from 1864 up to May or June, 1869, no discovery had been made that the contract in question was against public policy, and that during that time defendant gave to plaintiff for ferrying all passengers and freight going to or coming from St Louis, on or for its road, is also conceded.

The fact that since that time all freight carried by defendant loaded in its cars and transferred without breaking bulk, was transferred, not by the Wiggins, but by the Madison County Ferry, is also conceded, and it is this car transfer so made of which plaintiff complains, and which it sets up as a breach of defendant's contract. But the fact that such transfer constituted a breach of the contract is denied by defendant, who claims, first, that the contract did not embrace car transfer, that such method of transfer was not used by

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plaintiff at the time it was entered into, and was not, therefore, contemplated by the parties; second, that if embraced, the public interest demanded car transfer at the Madison County Ferry, which could not be met by the Wiggins Ferry, and that, in this conflict between the obligation of defendant and public interest, the obligation yields and ceases to be enforceable.

While it is true that plaintiff and defendant may be presumed to have contracted with reference to the condition of things existing at the time the contract was made, it is equally true that they must be presumed to have contracted with reference to the fact that if, in the future, other methods than those then in use, for the transfer of passengers and freight from the rail terminus of defendant's road to plaintiff's boats, and improved methods in the construction of boats for the reception of such freight should be invented, and proved by trial to be more efficacious as to cheapness, safety and dispatch than those then in use, it would be the duty of plaintiff to adopt them upon the requirement of defendant. Hutchinson on Carriers, § 529; Meier *v.* Penn. R. R. Co., 64 Pa. St. 225; s. c., 3 Am. Rep. 581. We think it cannot reasonably be claimed that if an improved method had been invented in applying steam power in propelling ferry boats, whereby the transportation of freight and persons would have been cheapened and facilitated, defendant, under the contract, could not have demanded its adoption, and that it would not have been the duty of plaintiff to have complied with it. The obligation assumed by plaintiff to ferry all freight requiring to be ferried is unrestricted and broad enough to cover freight brought on to its boats loaded in cars propelled by steam, as well as freight brought to them loaded in wagons drawn by horses and mules. If the ferrying of freight loaded in cars without breaking bulk had been demanded by defendant because it was cheaper, safer and more expeditious than transfer by parcels, it would have been the duty of plaintiff to have provided boats to meet the demand. If the defendant, in the interest of the public, and its own, desired to avail itself of such improved method, it should have signified its desire to plaintiff and afforded it an opportunity to furnish the proper facilities by conforming its boats to such method.

If defendant owed a charter duty only to the public to provide means of transit across the Mississippi, and the evidence in the case showed that the public interest could not have been as well served by car transfer at the Wiggins as at the Madison County Ferry, an excuse might be found for defendant's failure to make such demand, and a reason offered why its obligation to defendant should not be enforced. We think the evidence fails to show this. It shows that defendant, on the 9th day of March, 1866, entered into a written agreement with the Madison County Ferry, which had its landing at the town of Venice about five-eighths of a mile from

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the most northern point where the Wiggins Ferry had a right to land, and about two miles from the Wiggins Ferry landing on Bloody Island, in which agreement defendant secured to itself depot grounds, right of way for switching tracks and right to build a grain elevator on the land acquired; it also secured an obligation from the Madison County Ferry at all times to keep and maintain ferry boats sufficient to accommodate all the business and traffic of defendant's road which of necessity should be done by ferry boats at that point, and to do such ferrying at prices not to exceed those charged for similar service by other ferry companies engaged in like business at or near the premises therein conveyed. Defendant bound itself to use the property conveyed for the uses therein expressed, also to establish a local station at the town of Venice, a small village, whose metropolitan proportions are not shown, situated about two miles north of the rail terminus of defendant's road at East St. Louis, and from time to time to erect at said station such buildings for freight and passenger traffic as might be necessary for the accommodation of business at that point. Said agreement also contains the following stipulations:

"And the said party of the second part (the railroad company) hereby further covenants and agrees to and with said first party that it, the said second party, will not at any time hereafter establish, or attempt to establish, for its own use, or aid or assist in the establishment or maintenance of any other ferry company intending to compete with the party of the first part for the ferrying business to be done from the lands of the first party in Madison county, and at said station of Venice, and that it, the said second party, will not seek to divert traffic which may be offered for said station and ferry to other points on the line of the railroad now operated by it, the said second party, and that it, the said second party, will, at all times during the continuance of this agreement, offer the same facilities and accommodation to parties desiring to do business either to or from said station as are by it, the said second party, afforded to parties who ship freights to or from other points on the line of the railroad now operated by said second party. And the parties hereto mutually covenant and agree that in case it shall at any time hereafter be deemed advisable to adopt a method of transporting freights and passengers across the Mississippi river at said station differing from the method now existing and in use, and that, by reason of such change in said mode of transferring freights and passengers, it shall become necessary to construct a new landing specially adapted to such new mode of transfer at said station, then and in that case the said party of the second part shall and will, at its own proper cost and expense, erect and construct such new landing at some point on the river front of the premises hereinbefore granted and conveyed to said second party by the first party, and below the present landing of the party

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of the first part, and that said second party shall and will in such case build and maintain all tracks and other appurtenances which shall be necessary and proper to render the said new landing so to be constructed as aforesaid available for the purpose of the new mode of transfer aforesaid. And the said first party agrees in such case that it will so alter and construct the ferry boats at that time in use by said first party that the same shall be by such alteration and construction adapted to the new mode of transfer so adopted as aforesaid, and capable of amply accommodating all the business which may be offered at said station of Venice by reason of such change in the manner of transacting the same as aforesaid."

The evidence also shows that in May or June, 1869, car transfer was introduced at the Madison County Ferry at Venice, and that defendant prepared, at its own cost, the said landing stipulated for, and also switch tracks for transfer of cars to the boats of said ferry, and that ever since that time whenever freight in cars was passed over the river, it was done by said ferry; that said cars so transferred were first carried through the town of Venice to the terminus of defendant's road in East St. Louis, and the freight destined for St. Louis or beyond, if not billed to St. Louis via Venice, was detained to await orders as to how it should be shipped across the river, whether by car transfer at Venice or parcel transfer in loaded wagons at the Wiggins Ferry. If such freight was ordered to be sent by the Venice Ferry, the order was obeyed, and such cars as well as cars containing freight billed to St. Louis via Venice, were sent back to Venice, a distance of about two miles, and switched on to a track connecting with the Venice car transfer boat at a cost of $1.50 per car, and when loaded on such boat, if it landed on the St. Louis side at Carr Street, the distance which it travelled was about two miles, or if it landed at Chouteau Avenue or the depots of the Iron Mountain and Pacific R. R. Co., the distance was about four miles. The evidence shows that the Wiggins Ferry Co. introduced car transfer in the summer of 1870, and that thirteen out of fourteen railroads used its car transfer boats, and the distance traversed to make its landing at said Carr Street was about 700 yards, and the distance to make its landing at said Chouteau Avenue was about two miles. While the evidence showed that defendant, in consequence of the steepness of the grade, could not extend its track in a direct line to plaintiff's transfer boats, it also showed that an extension and connection could have been made by a curved line. Mr. Bisdom testified that there was no difficulty in making approaches for the Chicago and Alton by a curved line. Mr. Smith, a railroad engineer of ten or twelve years' experience, testified that he was familiar with car transfer approaches at East St. Louis, and that one could be well made from the Chicago and Alton track on a sixteen degree curve and 300 foot radius. Mr. Clubb testified that the track of the Chicago and Alton, from its depot at East St. Louis

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to Brooklyn, runs parallel with the river, in some places within 250 feet of it; that between it and the river there is open ground, and that there was no reason why the Chicago and Alton could not, with a track of 1200 feet, connect with the Wiggins transfer at the south line of the town of Brooklyn.

The evidence also shows that on the 18th day of April, 1870, the following circular was issue:

"CHICAGO AND ALTON R. R. Co., April 18th, 1870.

"Instructions to Agents: Complaint has been made to this company by the Wiggins Ferry Co. of St. Louis, that its agents have, contrary to formeri nstructions issued them on this subject, in some cases forwarded freight sent to and from St. Louis, by way of Venice, in Madison county, without instructions from the shipper or consignee so to do. You are therefore specially instructed, in all cases without exception, where goods are delivered to this company for transportation to and from St. Louis, and no direction is given you by the person or persons controlling the same as to the route by which the same shall be sent, to way-bill such goods to or from the city of St. Louis, via East St. Louis. In cases where the person or persons controlling the goods delivered to this company for transportation to and from St. Louis, give orders that such goods shall be sent via any other point than East St. Louis, you are instructed to send the same according to the orders given, and in every case to note the directions of the shipper on the way-bill accompanying the goods and on the bill of lading delivered to the shipper. Agents are positively forbidden to use any attempt to influence shippers or other persons controlling the direction of freight either to or from St. Louis, in favor of any particular route, but in every case to leave such parties entirely free to ship by whatever route they may choose, without any interference on their part or attempt to control the direction of such freights.

"T. B. BLACKSTONE, President.

"J. C. MCMULLIN, General Superintendent."

In the light of these facts, we are satisfied that public interest could not only have been as well but better served by car transfer at the Wiggins than at the Venice ferry, and that the contract of 1866 between the defendant and the Madison County Ferry was in fraud of the rights of plaintiff under the contract of 1864, and made in the interest of defendant and not in the interest of either the public or the shipper. We cannot resist the impression which the above facts have made upon our minds; that they evince a purpose on the part of defendant how not to perform its contract with the Wiggins Ferry Co., so as to evade the obligations it imposed, and at the same time to retain all the benefits it received under it. While we recognize the right of the shipper to direct the route by which his goods shall be carried, and the correspond-

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ing duty of the carrier to obey the direction, we do not think the principle can be invoked by defendant in this case to relieve it from responsibility incurred under the contract of 1864, for the reason that the evidence tends strongly, if not conclusively, to show that the defendant, by its action in the premises, had reduced the shipper to the necessity of electing to take either wagon or piece transfer at the Wiggins ferry, or car transfer at the Venice ferry, and thus forced the shipper to accept car transfer at Venice, thereby subjecting his goods to transportation on the water a distance twice as great as that to which they would have been subjected if transferred by the Wiggins ferry.

In this view of the case the question as to whether the way-bill copy-books and manifest copy-books offered in evidence ought or not to have been received, is immaterial. The purpose for which they were offered was to show that the defendant was directed by the shipper to use the Venice ferry in making car transfer, and acted in obedience to such orders. If the evidence offered would have established the above facts, still in view of the further fact already established, that defendant, by declining to have car transfer at the Wiggins ferry, when the evidence shows it could have been had with more facility than at Venice, and defendant, under its contract with plaintiff, was bound to provide for it, had reduced the shipper to the necessity of taking car transfer at Venice, where it had been provided at the instance and suggestion of defendant in disregard of its obligations to plaintiff, defendant cannot be heard to say that it violated its contract by direction of the shipper. The choice of the shipper having been thus compelled by defendant, it is as much bound by the act as if it had directly controlled the transfer. Defendant cannot be heard to say that it did not, but that the shipper did control the car transfer at Venice, when it is clear from the evidence that such control by the shipper was brought about and forced upon him by the wrongful act of defendant in not regarding the obligations of the contract with plaintiff.

While the exceptions made to the report of the referee might well have been overruled on the ground that they were not so specific as to inform the court in what particular the report was unsustained by the evidence, nor wherein it was against the law and instructions of the court, nor what incompetent evidence was rejected by the referee, still if we consider, as contended for by counsel, that the exceptions were sufficiently specific to require the court to look into the evidence on which the report was based, we are of the opinion that the trial court did not err in overruling the exceptions, inasmuch as there was evidence tending to establish every fact found by the referee. It has been held by this court in the cases of Western Boatman's Benev. Asso. *v.* Kribben, 48 Mo. 37, and Franz *v.* Dietrick, 49 Mo. 95, that the report of a referee is equivalent to a special verdict and will not be disturbed on

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appeal as being against the weight of evidence; that we will not go into a consideration of the sufficiency of the evidence to support the finding of the referee. "The finding of the referee stands as the verdict of a jury, and where there is any evidence to sustain it we will suppose that the whole evidence was properly weighed and the requisite effect given it."

The referee in his report gave to plaintiff as damages the profits for ferrying all cars transferred by the Venice ferry containing freight received and billed for carriage over defendant's road at places or for destinations beyond the terminus of its road. The referee, in thus acting, adopted the rule laid down by the trial court in giving its judgment, where it is said that "the conclusion reached, therefore, is, that the proper construction of the agreement required the defendant in all cases where it engaged in contracts for the transportation of persons or property beyond the terminus of its road, and the execution of such contracts required the employment of a ferry between St. Louis and the Illinois shore, to employ the ferry of plaintiff, and in whatever instances the defendant has failed to do this it is liable for all profits lost to it by reason of such failure, and this applies as well to freights in bulk or cars as in parcels or packages. In view of the fact that defendant obligated plaintiff always to keep sufficient ferry boats and appliances to do all the ferrying of persons and property required to be done, and the fact that plaintiff had fully complied with its obligation and had incurred all the expense of time, money and labor to carry the required freight, the above rule for the measurement of damages was fully authorized. Pond *v.* Wyman, 15 Mo. 183; Nearns *v.* Harbert, 25 Mo. 352.

The instructions given by the court show that the cause was tried upon a view of the case more favorable to defendant than that which we have taken of it, and upon full examination of the record we are unable to perceive that any error was committed against the defendant, and will, therefore, reverse the judgment of the court of appeals and affirm that of the circuit court, in which all the judges concur.

Power of railroads to contract with connecting lines to carry passengers and freight beyond its own termini.—It will be observed that the court holds that the ferry company had already secured from the legislature the right to carry across the Mississippi all passengers and freight to be ferried across from the terminus of the railroad, not only at that point, but for some distance above and below, and that the company already having established its terminus at the ferry landing, there was little or no inducement for the ferry company to enter into the contract to carry all freight and passengers of the railroad company, when already by law it was compelled to do so if the proper compensation for such transportation was tendered; but on the contrary it was a great inducement to the railroad company to secure the right of passage for its passengers to and from its terminus and the city of St. Louis, since nearly all passengers and freight over its road was destined to or from such city. Further, the ferry company do not seek to avoid the contract because it is

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ultra vires, or without consideration, but it is the railroad company that has received the only, apparently, benefit resulting from the contract.

But it is well settled that a common carrier may contract to carry to a point beyond the terminus of its own line so as to become liable for its delivery at such point, and that the liability attaching at the commencement will continue throughout the whole transit. East Tenn., etc., R. R. Co. v. Nelson, 1 Cold. 276; Newell v. Smith, 49 Vt. 255; Roberts v. Van Buskirk, 31 N. Y. 661; Steamboat Co. v. Brown, 54 Pa. St. 77; Noyes v. Railroad Co., 27 Vt. 110; Quimby v. Vanderbilt, 17 N. Y. 306; Williams v. Vanderbilt, 28 N. Y. 217; Peet v. Railway Co., 19 Wis. 118; St. Louis, etc., R. R. Co. v. Pipes, 13 Kan. 505; Wahl v. Holt, 26 Wis. 708; Illinois Cent. R. R. Co. v. Johnson, 34 Ill. 389; Root v. G. W. R. R. Co., 45 N. Y. 524; Illinois Cent. R. R. Co. v. Copeland, 24 Ill. 332; Condit v. G. T. R. W., 4 Laws, 106; Pennsylvania R. R. Co. v. Berry, 68 Pa. St. 272; Southern Express Co. v. Shea, 38 Geo. 519; Bryan v. M. & P. R. R. Co., 11 Bush. 597.

It is the established doctrine in England that when a carrier accepts for carriage goods directed to a destination beyond its own route, it assumes by the very act of acceptance, in the absence of any express contract upon the subject, the obligation to transport them to the place to which they are directed. Muschamp v. Lancaster & Preston Junction R. W., 8 M. and W. 421; Scothorn v. Railway, 8 Exch. 341; Crouch v. Railway, 2 Hurl. and Nor. 491; same case, 3 H. and N. 383; Wilby v. Railway, 2 H. and N. 703.

This is carried to such an extent that in case of loss of the goods, no matter on which of half a dozen lines necessary to carry them to their destination, only the company contracting to carry them can be held liable by the owner of the goods. Collins v. Railway, 11 Exch. 790; Mytton v. Railway, 4 H. and N. 615; Coxon v. Railway, 5 H. and N. 274.

A number of American cases hold that the acceptance of the goods, in the absence of an express contract, bids the carrier to transport them as consigned or directed, although it may be to a place to which the carrier itself does not carry, and by so accepting the goods it binds itself to be responsible for their safe delivery at their destination. Illinois Central R. R. Co. v. Copeland, 24 Ill. 332; Illinois Central R. R. Co. v. Johnson, 34 Ill. 389; Illinois Central R. R. Co. v. Frankenberg, 54 Ill. 88; Chicago, etc., R. R. Co. v. People, 56 Ill. 365; U. S. Express Co. v. Haines, 67 Ill. 137; Adams Express Co. v. Wilson, 81 Ill. 339; Bradford v. Railroad, 7 Rich. 201; Southern Express Co. v. Shea, 38 Geo. 519; Mosher v. Southern Express Co., 38 Geo. 37; Kyle v. Railroad, 10 Rich. 382; Weed v. Railroad, 19 Wend. 534; Carter v. Peck, 4 Sneed, 201; Bennet v. Filyaw, 1 Fla. 403; Mulligan v. Railway, 36 Iowa, 181; Western & Atlanta R. R. Co. v. McElwel, 6 Heisk. 208; Angle v. Railroad, 9 Iowa, 487; East Tenn. & Va. R. R. Co. v. Rogers, 6 Heisk. 143; Louisville, etc., R. R. Co. v. Campbell, 7 Heisk. 253; Lock Company v. Railroad Co., 48 N. H. 339.

Other American cases hold against the rule referred to, and with emphasis pronounce against it as unjust to the carrier, and is unnecessary upon any grounds of public policy. These uses hold in the absence of any contract, except such as generally to be implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the transportation to the end of the route and a delivery there to the next succeeding carrier to further the transportation. Nutting v. Railroad, 1 Gray, 502; Darling v. Railroad, 11 Allen. 295; Phillips v. Railroad, 78 N. C. 294; Hood v. Railroad, 22 Conn. 502; Perkins v. Railroad, 47 Me. 589; Skinner v. Hall, 60 Me. 477; Pautation v. Hall, 61 Me. 517; Railroad Co. v. Manufacturing Co., 16 Wall. 318; Railroad Co. v. Pratt, 22 Wall. 123; Santvoord v. St. John, 6 Hill, 158; Brintnall v. Railroad, 32 Vt. 665; Farmers' and Mechanics' Bank v. Trans. Co., 23 Vt. 186; McMillan v. Railroad, 16 Mich. 120; Crawford v. Railroad Association, 51 Miss. 222; Burroughs v. Railroad, 100 Mass. 26; Camden,

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etc., R. R. Co. v. Forsyth, 61 Pa. St. 81; B. & O. R. R. Co. v. Schumaker, 29 Md. 176; Irish v. Railroad, 19 Minn. 376; Condict v. Railroad, 54 N. Y. 502; Elmore v. Railroad, 23 Conn. 457; Root v. Railroad, 45 N. Y. 524.

It will be seen that the greater weight of authority and number of cases is decidedly against the English rule.

In Georgia the cases hold that the owner of the goods must seek his remedy exclusively from the carrier with whom the contract for carriage was in the first place made. Mosher v. Southern Express Co., 38 Geo. 37; Southern Express Co. v. Shea, 38 Geo. 519.

But other cases hold differently and give the owner of the goods his option as against which company he will bring his action—either against the company to whom he delivered them or the company's agent to forward them. Illinois Central R. R. Co. v. Cowels, 32 Ill. 116; Anchor Line v. Dartes, 68 Ill. 369; Southern Express Co. v. Hess, 53 Ala. 19; Barter v. Wheeler, 49 N. H. 9; Chicago & N. W. R. W. Co. v. Packet Co., 70 Ill. 218.

But aside from any construction of an implied contract arising by an acceptance of goods marked for a point beyond the carrier's line, there is no doubt but that a contract entered into by the carrier for that purpose is valid and will be enforced, even though the point of destination (as in the principal case) is beyond the State line. Burtis v. Railroad, 24 N. Y. 272; Bennett v. Peninsular Steamboat Co., 6 Com. B. 775; Phillips v. Railroad, 78 N. C. 294; Root v. Railroad, 45 N. Y. 532; Pratt v. Railroad, 22 Wall. 132; Hill Man. Co. v. Railroad, 104 Mass. 122; Gray v. Jackson, 51 N. H. 9; Woodward v. Railroad, 1 Biss. 403; Quimby v. Vanderbilt, 17 N. Y. 306.

And such an undertaking may be shown by any circumstances indicating an understanding between the parties that the carriage was to be for the whole distance, such as a through bill of lading or receipt. Candee v. Pennsylvania R. R. Co., 21 Wis. 582; or by showing that the carrier held itself out as a carrier and received payment for the entire distance. Berg v. Narragansett Steamship Co., 5 Daly, 394; Evansville, etc., R. R. Co. v. Androscoggin Mills, 22 Wall. 594; Robinson v. Merchants' Despatch Trans. Co., 45 Ia. 470.

One passenger carrier may sell his own and at the same time the tickets of connecting lines, entitling the passenger to through transportation to his destination over all the lines, and may receive the fare for the whole distance, without becoming responsible for the passenger's carriage beyond his own line.

The tickets in such cases are known as coupon tickets, and such ticket is considered a separate contract of the carrier over whose route it entitles the holder to be carried. The carrier who sells them is the agent of the several lines. Knight v. Railroad, 56 Me. 234; Sprague v. Smith, 29 Vt. 421; Elmore v. Railroad, 23 Conn. 457; Milnor v. Railroad, 53 N. Y. 363; Hood v. Railroad, 22 Conn. 1; Kessler v. Railroad, 7 Lans. 62; Brooke v. Railway, 15 Mich. 332; Ellsworth v. Tart, 26 Ala. 733; Horton v. Railroad, 114 Mass. 44; Stimson v. Railroad, 98 Mass. 83.

Contra, Candee v. Railroad, 21 Wis. 582; Illinois Cent. R. R. Co. v. Copeland, 24 Ill. 332; Furstenhein v. Railroad, 9 Heisk. 238.

Notwithstanding the general rule, that railroad companies may bind themselves to carry goods beyond the termini of their own lines, the supreme court of Connecticut has declared such contracts void. Hood v. Railroad, 22 Conn. 1; Converse v. Transportation Co., 33 Conn. 166; S. C., 6 Amer. L. Reg., 214; Naugatuck R. R. Co. v. Waterbury Button Co., 24 Conn. 468; Elmore v. Nantucket R. R. Co., 23 Conn. 457.

But if the charters of such companies had authorized them to extend their lines into another State (as in the principal case), or to make such class of contracts, it is very doubtful if a contract would be held void wherein it was agreed to carry goods into another State or beyond the termination of the company's line.

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But in the great majority of cases a railroad company in making such contracts is held to the same liability as private individuals, and no distinction between the contract of a private individual and a corporation is drawn. Wilby v. Railway, 2 Hurl. & Nor. 703; Perkins v. Railroad, 47 Me. 573; Root v. Railroad, 45 N. Y. 524; Buffet v. Railroad, 40 N. Y. 168; Western, etc., R. R. Co. v. McElwel, 6 Heisk. 219; Burtis v. Railroad, 24 N. Y. 269; Bissell v. Michigan, etc., R. R. Co., 22 N. Y. 258; Wart v. Railroad, 4 Seld. 57; Schroeder v. Railroad, 4 Duer, 55; Hill Man. Co. v. Railroad, 104 Mass. 122; Noyes v. Railroad, 27 Vt. 110; Feital v. Railroad Co., 109 Mass. 398.

For two very instructive cases upon the liability of common carriers to transport goods beyond the termini of their own lines, when there is a contract express or implied, see that of the New Hampshire Supreme Court,—Nashua Lock Co. v. Worcester, etc., R. R. Co., 10 Amer. L. Reg. 244 (1871) and note by Judge Redfield. Also of the Vermont Supreme Court, Morse v. Brainerd, 8 Amer. L. Reg. 604 (1869), and note. See also St. Louis Ins. Co. v. St. Louis, etc., R. R. Co., 3 Am. & Eng. R. R. Cas. 260, and note; Helliwell v. Grand Trunk R. R. Co., 1 Am. & Eng. R. R. Cas. 615; Baltimore & Ohio R. R. Co. v. Campbell, 1 Am. & Eng. 246.

Restraint of trade.—The court in the principal case draws a well-known distinction with regard to contracts in restraint of trade. Such a contract is void if it is given for a general restraint of trade; but it is otherwise if the restraint is partial and reasonable. What is a void contract must depend largely upon the construction to be placed upon the contract, the extent of the business, whether it is necessarily confined to one section of the country, or may be carried on in many sections.

Thus where A was engaged in navigating the waters of California alone, and in 1864 sold a steamer to B, engaged in navigating the Columbia River in Oregon and Washington Territories, subject to a stipulation that he, B, would not employ it or suffer it to be employed for ten years from the date of sale in any waters of California, and B three years afterwards sold the steamer to C, engaged in navigating Puget's Sound, subject to a stipulation that she should not be run or employed upon any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia River or its tributaries, for the period of ten years from May 1st, 1867, it was held that the latter contract was not void or in restraint of trade, because it was only in partial restraint of trade. Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64. But see Wright v. Rider, 36 Cal. 642.

A contract in restraint of the right of making, selling and trading fanning mills south of the Wabash River, within thirty miles of Marion, Indiana, was held to be unobjectionable. Bowser v. Bliss, 7 Blackf. 344. So a bond not to practise as a surgeon within ten miles of Thetford was held valid. Davis v. Mason, 5 T. R. 118; or not to practise as a surgeon in Aylesburg or within twenty miles. Hayward v. Young, 2 Chitt. 407. In the case of an attorney, the limit of London and one hundred and fifty miles from thence, was held reasonable. Bunn v. Guy, 4 East, 190. So the case of a milkman, the limit of five miles from Northampton Square, in the county of Middlesex, was held reasonable. Proctor v. Sargeant, 2 Mann. & Gr. 20. Where the agreement was that the defendant should become assistant to the plaintiffs in their business of surgeon dentists for four years; that the plaintiff should instruct him in the business of a surgeon dentist; and that at the expiration of the term the defendant should not carry on that business in London, or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of such service, it was held that the contract was valid as to London, but void as to not practising in towns where the plaintiffs might have been practising during the service, as an unreasonable restriction. Millan v. May, 11 Mees. & Welbs. 658. So a contract not to practise medicine, upon a valuable consideration, within

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twelve miles of a particular locality is valid. McClurg's Appeal, 58 Penn. Not to engage in a particular trade for a specified time in the city of St. Louis, or at any other place, is valid as to the city of St. Louis but void as to general restraint. Peltz v. Eichele, 62 Mo. 171; Presbury v. Fisher, 18 Mo. 50; Dean v. Emerson, 102 Mass. 480.

Where the plaintiff purchased of the defendant "Bentley's Miscellany," which was then an established magazine, and took an agreement that the defendant would not publish another periodical of a like nature. Afterwards the defendant entered into an arrangement to become the publishers of "Temple Bar," a periodical of like nature, and within the restriction. It was held that the agreement was valid. Ainsworth v. Bentley, 14 Weekly Rep. 630. So a general agreement not to write for any weekly periodical for one year is valid, although not limited as to space. Stiff v. Cossell, 2 Jur. (N. S.) 348. See Ingram v. Stiff, 5 Jur. (N. S.) 947. In Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345, a company had been formed for the purpose of working a certain process of manufacture introduced into Great Britain from America. They purchased the right, with an agreement of the vendors that they would not carry on in any part of Europe any company having for its object the manufacture or sale of production therein manufactured in the business or manufacture of the vendors. It was held that the restraint was not greater, having a regard to the subject matter of the contract, than was necessary for the protection of the purchasers, and it was enforced against the vendors. See Morse Twist Drill & Machine Co. v. Morse, 103 Mass. 73; Boutelle v. Smith, Mass. 111; Angier v. Webber, 14 Allen, 211; Gilman v. Dwight, 13 Gray, 356.

A bond conditioned that the obligor shall never carry on or be concerned in the business of founding iron, is void. Alger v. Thacher, 19 Pick. 51. A contract not to manufacture stearine candles at any place within the United States, is void. Lange v. Werk, 2 Ohio St. 520; Bank v. King, 44 N. Y. 85; Callahan v. Donnolly, 45 Cal. 152. Possibly, contra. Stearns v. Barrett, 1 Pick. 443, and Morse Twist Drill, etc., Co. v. Morse, 103 Mass. 73. The case of Roussillon v. Roussillon, 14 Ch. Div. 351, denied the condition as to limit of space. and a covenant unlimited as to space enforced. See also Leather Cloth Co. v. Lornsot, 9 Eq. 353.

On order that it may not be unreasonable, the restraint imposed must not be longer than is required for the necessary protection of the party with whom the contract is made. Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; Horner v. Grover, 7 Bing. 743; Catt v. Tourle, 4 Ch. 659; Leather Cloth Co. v. Lorsont, 9 Eq. 349; Allsopp v. Wheatcroft, 15 Eq. 61; Grosselli v. Lowden, 11 O. St. 349; Lange v. Werk, 2 O. St. 520; Chappel v. Brockway, 21 Wend. 157; Gilman v. Dwight, 13 Gray, 356; Cal. S. N. Co. v. Wright, 6 Cal. 258; Dunlop v. Gregory, 10 N. Y. 241; Long v. Towl, 42 Mo. 545; Hubbard v. Miller, 27 Mich. 15; Nobler v. Bates, 7 Cow. 309; Mitchel v. Reynolds, 1 P. Wm. 181; Hitchcock v. Coker, 6 Ad. & El. 438; Leighton v. Waler, 3 M. & W. 545.

A contract not to exercise a trade within a particular State, when the contractor so binding himself is a resident of such State, has been generally held void. Taylor v. Blanchard, 13 Allen, 375; Dunlop v. Gregory, 6 Seld. 241; Wright v. Ryder, 36 Cal. 342; Moore v. Bonnet, 40 Cal. 251.

It will be observed that the contract to employ the ferry company, in the principal case, is unlimited as to time. Such contracts are valid. Hitchcock v. Coker, 6 Ad. & E. 438; Mumford v. Getting, 7 C. B. (N. S.) 305; S. C., 29 L. J. (C. P.) 195; Harms v. Parsons, 32 Beav. 328; Catt v. Tourle, 4 Ch. 654; Leather Cloth Co. v. Lorsont, 9 Eq. 345; May v. O'Neill. Weekly Notes, 179 (1875). The contract with the ferry company is construed so as to compel it to furnish all modern improvements so as to enable the railroad to more expeditiously transfer its passengers and freight; and that, too, without any reference being made thereto in the contract.

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It is undoubtedly the law that carriers must provide themselves with all improvements and inventions in the manner and construction of their vehicles as conduce to the safety of passengers by their modes of conveyance. Smith v. Railroad, 19 N. Y. 127 (a switch of an old pattern); Hegeman v. Western Railroad, 16 Barb. 353; S. C. 13 N. Y. 9 (broken axle); Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282 (defective boiler); Meier v. Railroad, 64 Pa. St. 225 (defective axle); Nashville, etc., R. R. Co. v. Messino, 1 Sneed, 220 (running an engine without pilot); Nashville, etc., R. R. Co. v. Elliot, 1 Cold. 611 (defective bridge); Unger v. Railroad, 51 N. Y. 497 (defective hook for attaching horses to a car which broke and frightened the horses attached to the car, whereby they ran over the plaintiff and injured him); Taylor v. Railway, 48 N. H. 304 (defective rail); Toledo, etc., R. R. Co. v. Conroy, 68 Ill. 560; Oliver v. N. Y. & E. R. R. Co., 1 Edmonds, 589 (defective axle); Alden v. N. Y. Cent. R. R. Co., 26 N. Y. 102 (same); McPadden v. Same, 44 N. Y. 478 (same); P. C. & St. L. v. Thompson, 56 Ill. 138 (road bed); Holyoke v. Grand Trunk R. R., 48 N. H. 541 (same); Reed v. N. Y. Cent. R. R. Co., 56 Barb. 493 (same); Virginia Central R. R. Co., v. Sanger, 15 Gratt. 230 (ballasting); Brignoli v. Chicago, etc., R. R. Co., 4 Daly, 182 (defective rails); Michigan Southern, etc., R. R. Co. v. Lautz, 29 Ind. 528 (same); Matteson v. N. Y. Cent. R. R. Co., 62 Barb. 364; S. C., 35 N. Y. 487 (rail removed by section hands).

But this does not require the carrier to adopt untried machinery or mode of construction. Steinweg v. Railway, 43 N. Y. 123; and the general rule is held not to be applicable to ferrymen. LeBarron v. Ferry Co., 11 Allen, 312.

It is intimated in the principal case that if the contract did not show that it contained an agreement that the Alton & St. Louis R. R. Co. should have a right to assign the contract to the Chicago & Alton R. R. Co., and from an averment in the petition that the contract was entered into by the first in behalf of the latter company, that the defendant would not be liable on the contract by reason of the assignment. It also appears that the latter company accepted the assignment subject to all the covenants of the contract. This was held very properly to bind the assignee to a performance of all the stipulations of the contract.

Most cases where the assignee has been held liable upon such agreements are cases where he assumed to pay a mortgage by accepting a deed for the lands mortgaged with a stipulation to that effect. Pike v. Brown, 7 Cush. 133; Goodwin v. Gilbert, 9 Mass. 510; Felch v. Taylor, 18 Pick. 133; Braman v. Dowse, 12 Cush. 227; McCabe v. Swak, 14 Allen, 188; Maine v. Cumston, 98 Mass. 317; Fumor v. Durgin, 119 Mass. 500; Jewett v. Draper, 6 Allen, 434; Crawford v. Edwards, 33 Mich. 354; Trotter v. Hughes, 2 Kernan, 78; Atlantic Dock Co. v. Leavitt, 54 N. Y. 38; Belmont v. Cornan, 22 N. Y. 438; Drury v. Tremont Improvement Co., 13 Allen, 171; Thayer v. Toney, 37 N. J. L. 339; Tichenor v. Dodd, 3 Green (N. J.), Ch. 454; Stebbins v. Hall, 29 Barb. 524; Moore's Appeal, 7 Rep. 538.

The ground that the contract was ultra vires is certainly untenable. By its charter the road was authorized to extend its line to the City of St. Louis, having only reached the river's brink opposite the city, and it being impossible to further extend it without a very expensive bridge (and in order to build the same a grant from Congress was necessary for the privilege), it had undoubted power to contract for the conveyance of its passengers and freight by the ferry company. The consideration given for this privilege was the granting by the ferry company to the railroad company a place for the latter's depot. The company had undoubted powers to take by the right of eminent domain ground for its depot, and it was an untenable argument to say that a contract for sufficient space to build such depot was ultra vires when it had the powers to take it by proceedings at law upon making the proper com-

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pensation. Nor can it be logically urged that the contract was ultra vires because the ferry company's compensation was not a money compensation; nor that it was so because in restraint of trade. If a corporation is authorized to make a contract, and no statute directs the manner in which it shall be executed or its terms, then, undoubtedly, the corporation may enter into such contract upon the same condition and terms that an individual could; each has neither more nor less power than the other, each are equally restrained and unrestrained. Viewed in whatever way it can be, the plea of ultra vires was certainly bad.

DE FORTH

v.

THE WISCONSIN & MINNESOTA R. R. CO., imp.

(52 *Wisconsin Reports. April* 22–*May* 10, 1881.)

Where a town board of supervisors is authorized by law to issue bonds in aid of a railroad only upon the presentation of a petition therefor signed by a certain number of tax payers of the town, the procuring and affixing of such signatures on Sunday is "business," and is unlawful, and confers no authority upon the supervisors to issue such bonds.

The fact that plaintiff affixed his signature on Sunday will not prevent him from obtaining an injunction against the issue of the bonds on the ground that the required number of signatures were not affixed on any secular day, where he did not on any secular day authorize the presentation of such petition to the supervisors, and where nothing had been done by the railroad company to earn the bonds before it was notified that plaintiff would resist their issue and denied the validity of such signature.

The complaint for an injunction in such a case need not aver that the persons who signed the petition on Sunday were not of the class described in sec. 4596, R. S., as persons "who conscientiously believe that the seventh day or any other day of the week ought to be observed as the Sabbath," etc.

APPEAL from the Circuit Court for Clark County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to restrain the board of supervisors of the town of Thorp from issuing, and the defendant railroad company from demanding or receiving from said town board, $5000 of the bonds of said town in exchange for the like amount of the capital stock of said company. The complaint sets out the fact that the town of Thorp is one of the duly organized towns in Clark county; and that the respondent is the owner of a large amount of real estate in said town, and a resident tax payer thereof. It then sets out that the railroad company, being about to construct a railroad through the counties of Clark and Chippewa, and partly through said town, made application for aid from said town under the provisions of sections 942–6, R. S., and that such application was made in the manner prescribed by the first subdivision of section 946. It sets out all the facts, showing that the company had

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apparently complied in all respects with the provisions of section 946 so as to entitle it to the $5000 of the bonds of the town, and to authorize the proper officers of said town to issue said $5000 of the bonds of said town in exchange for the like amount of the capital stock of such railroad company; and further alleges that the board of supervisors of said town threaten to issue said bonds and deliver them to the railroad company in exchange for such stock; that said company claims and insists that it is lawfully entitled to have and receive the said bonds from said town; that they will be issued by said board of supervisors and received by said railroad company unless restrained by the injunction of the court; and that, if they are so issued and received, the property of the plaintiff and of the other tax payers of the town will be taxed to pay the same and the interest thereon. It alleges, as a reason for enjoining the issuing of said bonds, that the petition of the resident tax payers of said town, required to be presented by the railroad company and filed with the clerk of the town, under the provisions of section 946, was void, and insufficient to authorize the issuing of said bonds, because thirteen of the resident tax payers whose names appear upon said petition, and without whose names, and all of them, such petition would not be signed by a majority of such resident tax payers, as prescribed by said section, signed such petition on Sunday, and most of them on Sunday the 11th day of July, 1880, and not at any other time; and that such petition was delivered by said railroad company to the clerk of said town, so signed, on the 12th day of July, 1880.

"Neither the board of supervisors nor the town clerk, who were made defendants with the railroad company, appeared in the action. The railroad company appeared, and filed a demurrer to the complaint, alleging, as the ground of demurrer, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the court ordered judgment in favor of the plaintiff, perpetually enjoining the issuing of said bonds. The defendant company filed exceptions, and appealed from the judgment."

Edwin H. Abbot and S. U. Pinney, for the appellant, argued among other things, that the contract between the town and company was not completed until the proposition had been accepted by the town. The statute provides that when the company delivers to the town clerk certain papers, then the proposition shall be deemed accepted. R. S. sec. 946. The complaint alleges that the delivery took place on Monday, July 12, 1880, in exact conformity to the provisions of the statute. Nothing was done between the contracting parties on Sunday. The contract took effect on a secular day. The signatures were prima facie regular, and the time when they were actually affixed to the petition is immaterial to the validity of that contract. The signatures made on Sunday were not void. They simply afford no aid to either party who is

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obliged to show affirmatively, as part of his case, the time when they were written. Smith *v.* Bean, 15 N. H. 577; Troewert *v.* Decker, 51 Wis. 46. The plaintiff in this case, in attacking the contract, is obliged to set up his own illegal act in his own behalf. This he cannot do. Myers *v.* Meinrath, 101 Mass. 366; Woodman *v.* Hubbard, 25 N. H. 67; Morton *v.* Gloster, 46 Me. 520; Hall *v.* Corcoran, 107 Mass. 251; Sutton *v.* Wauwatosa, 29 Wis. 21; Schmid *v.* Humphrey, 48 Iowa, 652; Holt *v.* Green, 73 Pa. St. 198. But, on the other hand, legal rights may arise out of acts done in violation of the Sunday laws, although those acts cannot be used as affirmative proof to establish such rights. The fact, therefore, of these signatures being made on Sunday does not impair the validity of the petition nor diminish its legal effect when delivered to the clerk. Goods were landed and stored on Sunday in the railroad warehouse, and then burnt. The warehouseman was held liable for their loss. Powhatan Steamboat Co. *v.* Appomattox R. R. Co., 24 How. 247. A note actually signed on Sunday but delivered on a secular day is valid. Lovejoy *v.* Whipple, 18 Vt. 379; Goss *v.* Whitney, 24 id. 187; S. C., 27 id. 272; Hilton *v.* Houghton, 35 Me. 143; Bank of Cumberland *v.* Mayberry, 48 id. 198. And a note made and delivered on Sunday, but indorsed before maturity to a bona fide holder without notice of the defect, cannot be impeached in his hands. State Capital Bank *v.* Thompson, 42 N. H. 369; Bank of Cumberland *v.* Mayberry, 48 Me. 198; Allen *v.* Deming, 14 N. H. 133. Notice of rescission of a contract was lawfully given on Sunday, did not come within the Nevada statute. Pence *v.* Langdon, 99 U. S. 578, 580. A deed made on Sunday cannot be avoided by a stranger to the transaction, who claims under a subsequent levy. Green *v.* Godfrey, 44 Me. 25; Richardson *v.* Kimball, 28 id. 463. And a contract fully executed on that day which passes title to property is a valid sale. Ellis *v.* Higgins, 32 Me. 34; Merritt *v.* Earle, 31 Barb. 38. A court of equity has never interposed by injunction in favor of a complainant who, as in this case, seeks its aid, for himself alone, on the single ground that he and his associates broke the law. And it will not do so, especially against a defendant whose only fault was that he executed on Monday the contract which the plaintiff had on Sunday expressly requested not the defendant but the other party to that contract to execute. The doctrine that no man shall take advantage of his own wrong is as firmly established in equity as in courts of law. Hawkins *v.* Hall, 4 Myl. & Cr. 281. In this case, too, the unlawful act, if any, was done by a third party, who is not even one of the contracting parties. It has been thus far assumed, arguendo, that the signing on Sunday was a violation of the statute; but this may well be doubted. Many acts which are neither charitable nor necessary may be done by individuals in

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their own matters on Sunday, without breaking the law. Thus, a will executed on Sunday is valid (Bennett *v.* Brooks, 9 Allen, 118); and marriage, which is a purely civil contract, under our law is valid. Gangwere's Estate, 14 Pa. St. 417. The transaction here impeached does not fall within the ordinary description of forbidden action. It is not, in any aspect, the making of a contract. It is, in fact, a mode of voting that the town be authorized to contract. Signing the petition does not differ in its nature from casting of a ballot. It is not "labor, business or work," unless the exercise of a public function comes within the sense of the phrase. The words "labor, business or work of their ordinary callings" are the phrase in the English statute (27 Car. II., c. 7, § 1), from which our Sunday laws are borrowed. The Massachusetts statute omits the last four words, and, like the Wisconsin statute, prohibits broadly, "labor, business or work." But in Massachusetts it is held "that the legislature did not intend to carry the prohibition further than to restrain the exercise of all those occupations and employments which make up the common and daily business of mankind, and such dealings and bargains as properly and usually appertain thereto." Bennett *v.* Brooks, 9 Allen, 118. The exercise of an electoral franchise is not within the prohibition. What is prohibited to the individual is the doing, for mere self-interest and profit, those not necessary acts which directly make for his own advantage. Such actions as concern the public weal, or the private unremunerated benefit of his fellows, are taken out of the statute. And governmental acts of all sorts have never, apparently, been construed to be within Sunday laws. Such acts, so far as they are prohibited on that day, are forbidden by special enactment, not by this statute, which only applies to and disqualifies private, not official, actors. See R. S., secs. 4595, 2576. If it be admitted by the respondent that the contract was wholly made on a secular day, but argued that the town had no authority to make such contract unless a "petition bearing the signatures," etc., should be filed; that the language of the statute must be construed to mean legal signatures; and that no signature on Sunday could be legal,—it is replied: 1. The respondent, at any rate, cannot set up this defect of authority. He is, substantially, estopped to plead it, for he created the defect. Knox *v.* Clifford, 38 Wis. 651, 657. 2. If the illegality is in the making of the signatures on that day, and the transaction was finished when they were written, then the law declines to interfere in an executed transaction, and leaves the parties where they have placed themselves. The respondent cannot set up the defect in his signature; and the record, being prima facie regular, is sufficient because unimpeached. Myers *v.* Meinrath, 101 Mass. 366; Smith *v.* Bean, 15 N. H. 577; Troewert *v.* Decker, 51 Wis. 46. 3. If, however, the getting of signatures to the petition is merely

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a part of the process of effecting the contract between the town and the company, then the contract is valid, because the petition was not filed, and the contract was not completed, until the filing on Monday. Merrill *v.* Downs, 41 N. H. 72; Smith *v.* Foster, id. 222; Adams *v.* Gay, 19 Vt. 369; Sumner *v.* Jones, 24 id. 317; Harris *v.* Morse, 49 Me. 432; Hilton *v.* Houghton, 35 id. 143; Commonwealth *v.* Kendig, 2 Pa. St. 451; Bailey *v.* Blanchard, 62 Me. 168; King *v.* Fleming, 72 Ill. 21; Tuckerman *v.* Hinckley, 9 Allen, 452; Stackpole *v.* Symonds, 23 N. H. 229; Dickinson *v.* Richmond, 97 Mass. 45; True *v.* Plumley, 36 Me. 466; Hoghtaling *v.* Osborn, 15 Johns. 119; Reid *v.* State, 53 Ala. 402; Huidekoper *v.* Cotton, 3 Watts, 56; State *v.* Ricketts, 74 N. C. 187; Baxter *v.* People, 2 Gilm. 578; Webber *v.* Merrill, 34 N. H. 202; Butler *v.* Kelsey, 15 Johns. 177; Melchoir *v.* McCarty, 31 Wis. 256. The complaint does not allege, and consequently the demurrer does not admit, that the Sunday signers were not conscientious believers in the observance of some other day than Sunday; and therefore it does not appear that they could not lawfully perform secular labor and business on the first day of the week. In the absence of such averment, their signatures cannot be presumed to have been made in violation of sec. 4595, R. S., but must be presumed to be valid under sec. 4596. See Dickinson *v.* Richmond, 97 Mass. 45; Tuckerman *v.* Hinkley, 9 Allen, 452; Sanders *v.* Johnson, 29 Ga. 526.

R. J. MacBride and James O'Neill, for the respondent:

The contract was effected by a series of transactions, all of which are essential to its validity; and if the company be shown to have proceeded illegally in any one of the steps to be taken, the whole contract fails. One of the necessary steps to render the proceedings to bond the town valid, is a valid petition bearing the lawful signatures of a majority of the resident tax payers of the town. Without this, there is no authority to contract. A petition signed on Sunday is void. The signing is "business" within the meaning of the statute, and is not a "work of necessity or charity." See Troewert *v.* Decker, 51 Wis. 46; Fivaz *v.* Nicholls, 2 M., G. & S. 500; Holt *v.* Green, 73 Pa. St. 198; Tillock *v.* Webb, 56 Me. 100; Melchoir *v.* McCarty, 31 Wis. 256; Gregg *v.* Wyman, 4 Cush. 326; Hall *v.* Corcoran, 107 Mass. 251; Merriam *v.* Stearns, 10 Cush. 257. It cannot be claimed that the respondent is not entitled to relief because he himself signed the petition on Sunday. It is not stated in the complaint that the Peter De Forth who signed the petition and the plaintiff are the same person. And it is not necessary for the respondent to show any unlawful act of his in order to show the illegality of the preceedings to bond the town. Only six of the nineteen signatures of resident tax payers were affixed on a secular day; so that the name of De Forth may

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be disregarded and the illegality of the proceedings will appear. Hall *v.* Corcoran, Melchoir *v.* McCarty, supra. Conceding that the respondent did sign the petition on Sunday, he is not estopped from maintaining this action. Congress & Empire Spring Co. *v.* Knowlton (U. S. Sup. Ct., Jan. 31, 1881), 23 Alb. L. J. 290. See also Winfield *v.* Dodge, 7 N. W. Rep. 906; Parker *v.* Latner, 60 Me. 528; Allen *v.* Duffy, 4 N. W. Rep. 429; Durant *v.* Phenier, id. 610. If the thirteen persons who signed on Sunday observed the seventh day as the Sabbath, this would be matter of defence to be pleaded and proved by the defendant. It would be no more necessary to allege that such signers did not observe the seventh day, than to allege that the plaintiff is twenty-one years of age. Sayer *v.* Wheeler, 31 Iowa, 112.

Counsel upon both sides also discussed at some length the question of the constitutional validity of the method of authorizing municipal subscriptions prescribed by sec. 946, R. S.

TAYLOR, J.—The allegations of the complaint show that it was necessary to have nineteen signatures of resident tax payers of the town to the petition in order to justify the issuing of the bonds, and that only six of these signatures were made on any secular day; all the others were made on Sunday. The real and material question in this case is, whether a petition signed by the resident tax payers on Sunday is a lawful petition, under the provisions of section 946, and would justify the issuing of the bonds of the town under said section. Section 4595, R. S., makes it unlawful "to do any manner of labor, business or work, except only works of necessity and charity," on the first day of the week, or Sunday. It was held by this court in Troewert *v.* Decker, 51 Wis. 46, that the loaning of money and giving a note therefor was business, within the meaning of this statute; and it appears to us perfectly clear that going about and procuring the signatures to a petition of the tax payers of a town, upon the presentation of which, properly signed, to the clerk of such town, the board of supervisors thereof would be authorized to execute and deliver to a railroad company the bonds of the town for a large sum of money, and pledge the credit thereof for the payment of the same and the interest thereon, is a very important business, so far as the railroad company and the town are concerned. We also think that when the tax payer subscribes his name to such petition he is doing business within the meaning of such statute. He is doing that which, if lawfully done, would authorize the incurring of a large indebtedness on the part of the town, and the granting of a large pecuniary benefit to the railroad company soliciting such signatures. One of the definitions of the word "business," given by Webster, is a "transaction." The signing of the petition was a very important part of a very important transaction between the railroad company

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and the town—so important that unless the signatures were obtained there would be no authority for the board of supervisors to issue the bonds, and no right on the part of the company to demand their issue. Without it the board would be devoid of any power to bind the town for the payment of any bonds they might issue in its name in aid of the railroad company. The fact that there was a petition signed by the proper number of resident tax payers, is made, by the provisions of section 946, the very foundation of the authority of the town officers to bind the town by issuing its bonds.

The defendant company having violated the law in procuring the signature of the tax payers to the petition, and the petitioners having also violated the law by signing the same on Sunday, it would seem to follow as a legal consequence that the company can derive no rights through or by virtue of such illegal action on its part. But the learned counsel for the appellant argues with much earnestness and ability, that because the petition was presented on a secular day, signed with the names of a sufficient number of the tax payers of the town, the town board not only had the power to act upon such petition without inquiry as to the time when the signatures were made, but that the company had the right to compel their action if they refused. The argument seems to go the length of holding that if the proper number of genuine signatures are attached to the petition when presented to the clerk, neither the town board nor any one else can question the methods by which such signatures were obtained. This, we think, is clearly a mistaken view of the question. It seems very clear to us that the sufficiency of the petition might be impeached by showing that the signatures were obtained by force or fraud; and there does not appear to us any good reason why its validity cannot be impeached by showing that the signatures were obtained in violation of the Sunday law. If a man gives his note on Sunday as the consideration for goods sold or money loaned, he may show the fact as defence, in an action to recover upon such note. He does not deny his promise or his signature; he admits that he has had the goods sold or the money loaned; and yet the law says the holder of the instrument cannot recover, because it was given in violation of the statute. In both the giving and taking of the note the statute was violated; and because the person taking the note was equally guilty with the maker of the same, the courts will not aid him in enforcing his contract so made. The contract in itself is not illegal, but because the making of it on Sunday was a violation of a criminal statute it cannot be enforced.

Will a court of equity permit a party to make use of a petition which is in the nature of a request or power of attorney, authorizing the town authorities to issue to him the bonds of a town, which shall be a charge upon the property of the petitioners and all other

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tax payers of the town, when it appears that such party obtained the signatures of the petitioners by an act which was a violation of the criminal laws of the state? If the appellant were proceeding against the officers of the town to compel the issuing of the bonds, there would not seem to be any doubt as to the right of the town authorities to set up the unlawful act of the appellant in procuring the signatures as a defence to the action. The law having required the appellant to procure the signatures of the tax payers to the petition before it is authorized to call upon the authorities to issue the bonds, the petition is the very foundation of the appellant's right; and when it is shown that the appellant violated the law in procuring the signatures, he is not in a position to ask the aid of a court to enforce a claim against the town founded upon such petition. In such case, the right depending upon the validity of the petition, it is no answer that in the first instance the appellant could make out a case without showing that it had violated any law. In such action the appellant's right to relief would rest upon the petition, and it being shown that the petition was obtained by an act which violates the criminal laws of the state, the court cannot grant the relief any more than in favor of the payee of a note made on Sunday. The payee, in his action, can make out his case without showing any violation of the law. He introduces his note, and he has made a case. The note may or may not show on its face that it was made on Sunday, and even though the date might show that fact, yet in favor of the legality of the contract the court, in the absence of other proofs, would probably presume that, notwithstanding the date, it was in fact delivered on a secular day. The proof of the illegal act of the payee comes from the defendant; but when made it shows that he cannot recover except by virtue of the contract which was made in violation of law, and his case fails.

This question was discussed and disposed of in the case of Myers *v.* Meinrath, 101 Mass. 366. Upon this question Justice Wells, who delivered the opinion, says: "The plaintiff concludes that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proofs by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court." We think it very clear that the appellant could not succeed in an action to compel the delivery of the bonds upon such petition.

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The learned counsel for the appellant also insists that if a court of equity would not aid the appellant in enforcing the delivery of the bonds, neither will it aid this plaintiff in his action to restrain the issuing of them, for the reason that he had shown himself equally guilty as the appellant of a violation of the law.

To this there are several answers: First, it does not appear with certainty from the complaint that the plaintiff was one of the persons and tax payers who signed the petition on Sunday; second, the plaintiff has made out a case by showing that the petition was invalid, by the fact that twelve tax payers other than himself signed on Sunday, each one of whose signatures was necessary to the sufficiency of the petition in respect to numbers; third, there does not appear to be any good reason why the plaintiff may not protect his property rights against a claim made against them by the appellant, which is based upon an unexecuted contract made in violation of law. The plaintiff makes out a good cause for relief when he shows that the petition was signed by less than half of the resident tax payers of the town, including himself, and excluding those other than himself who signed on Sunday. He need not and does not question his own signature in order to avoid the effect of it. He shows it wholly ineffectual without regard to his own connection therewith. But suppose it necessary for the plaintiff to allege that the petition is ineffectual because his signature was obtained thereto on Sunday: will this prevent him from successfully invoking the aid of a court of equity to restrain the defendant company from obtaining any rights against himself and the other tax payers of the town, based upon such signature so made? We think this question must be answered in the negative. The plaintiff does not seek to maintain his rights upon the alleged insufficient petition. His demand for relief against the threatened unlawful taxation of his property by the officers of the town and the defendant company, is based upon the proposition that the company has not taken the steps required by the statute to authorize such taxation; and, in order to show that, he shows that the petition they have obtained was obtained in such manner that neither a court of law nor of equity will permit its use by the company to found any right thereon. He only questions the right of the company to the bonds. His own right to have his land free from taxation to pay the principal and interest of bonds issued in aid of the defendant railroad company, is predicated upon the want of power in the officers of the town to charge his property with such tax. The officers and company claim the power by virtue of the petition, and threaten to execute such power, notwithstanding the fact that it is admitted that it was illegally obtained and is therefore ineffectual to confer upon the town officers the right to impose such tax.

It seems to us that the town and defendant company are in no

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better position to claim the right to have these bonds issued, than a party would be who claimed the enforcement of an executory contract made on Sunday. Upon such contract, if it be for the delivery of goods, and the delivery be not in fact made, the vendee acquires no title to the same. The contract to deliver, having been made on Sunday, is ineffectual to compel the vendor to make the delivery; and if the vendee should take possession of them without the consent of the vendor, he would be a mere trespasser, and the vendor could maintain any proper action against him to recover the possession of the same, or the value thereof, notwithstanding his executory contract made on Sunday; and the fact that such executory contract was made by the plaintiff would be no defence to such action. If a contract made on Sunday is fully executed, it is as effectual to fix the rights of the parties as though made on any other day; but if it be merely executory, or some part of it be executory, it is simply void as to such unexecuted part, or at least ineffectual to confer any rights under it, and neither party can enforce the same. This was held by this court in the case of Troewert *v.* Decker, supra, and the cases cited therein. See, also, Smith *v.* Bean, 15 N. H. 577.

In the case of Clough *v.* Davis, 9 N. H. 500, a note was executed on Sunday and put in the hands of another to deliver on Monday, and it was so delivered. The court say: "The note was written and signed on Sunday, but not delivered. The contract was not completed. The instrument given in evidence was not a subsisting contract on Sunday, nor so regarded by either party. It was wholly inoperative, unless something more had been done. But the note was placed in the hands of an agent with authority to deliver it upon the next day, and he did deliver it accordingly. If, however, a secular contract made on the Sabbath is prohibited, and therefore void, the authority to the agent, for the same reason, is equally against law and void." The court further said that the proof showing that the defendant had promised to pay the note after its delivery, such promise was a ratification of the act of the person who delivered the same, and bound the defendant. This case is commented upon in Smith *v.* Bean, supra, as follows: "But there the note was written on Sunday and given to an agent with authority to deliver it on Monday. No contract was completed on Sunday, but something remained to be done. The attempt to confer the authority on Sunday was ineffectual. It was the simple case of a person assuming to act as agent for another without authority. But the note came into the hands of the payee, whether with or without an original authority was immaterial, for, while it was there, the defendant promised to pay it, and thus made a new contract."

In the case at bar, the most that the plaintiff and the other petitioners did who signed on Sunday, was to authorize the agent of

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the defendant company to present such petition, so signed by them, on some secular day, and demand the issuing of the bonds according to the proposition made by the town. This contract or authority, being given on Sunday, was ineffectual and void, and, within the authorities above cited, would confer no power upon the company, having notice of the fact, to lawfully demand or receive the bonds, even though such power had never been formally revoked by the parties giving the same. No rights could be acquired under such authority given on Sunday, by any person having knowledge of the facts, except upon clear proof that the signers had ratified the authority of the company by some subsequent act on a secular day.

Whether a court of equity would release the plaintiff, or other persons in the same situation, had he permitted the petition to be used and the bonds issued, and after the company had expended money in constructing the proposed road, relying upon the validity of such bonds, is not a question in this case. The complaint shows that the plaintiff proceeded promptly to notify the town authorities and the defendant company that he did not propose to ratify in any way the illegal and void authority which the company had filed with the town clerk as a basis for the demand of the bonds. This suit was commenced within about three weeks after the petition was signed and filed in the clerk's office, and it nowhere appears from the complaint that the company had changed its position in any way in reliance upon its right to these bonds.

The plaintiff stands in a similar situation to a party who, on Sunday, authorized a third person, as his agent, to execute a contract for him or deliver property on some secular day, and who forbids the execution or delivery before it is effected. In such case, so far as such party's rights are concerned, he stands in the same situation as if no such authority had been given, and such third person cannot make such ineffectual and revoked authority a foundation for the assertion of any right on his part. In such case there is no reason why a court of equity should not lend its aid to protect the rights of the party who has revoked such agency, especially in a case like the one at bar, where the party against whom such aid is sought is seeking to enforce the contract without showing that any property or other consideration has been given to and received by the party insisting upon such revocation, and which he refuses to restore; in short, when the contract sought to be enforced is wholly unexecuted on both sides. Had the contract been executed by one party, there would be great force in the argument that a court of equity would not aid the other in avoiding the contract on his part. This is not a case of that kind. It is simply a proceeding to prevent the completion of a contract, pending its negotiation, and while still unexecuted by either party. We think the plaintiff has a good standing in a court of equity, and a clear right to the relief demanded.

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The objection made by the learned counsel for the appellant that the complaint does not allege that the signers of the petition, who signed on Sunday, were not "persons who conscientiously believed that the seventh or any other day of the week ought to be observed as the Sabbath," etc., as prescribed in section 4596, R. S., and is bad for that reason, is not, we think, sustained by the authorities. This was one of the points decided in the case of Troewert *v.* Decker, in this court, and was decided against the theory of the appellant upon the authority of the cases of Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen, 18, 21; and Hinckly *v.* Penobscott, 42 Me. 89. It is true, these cases arose upon the exceptions contained in section 4595; but the principle is, we think, the same as to the exceptions contained in the next section. These cases hold that the legal presumption is against the validity of an act done on Sunday, and it is for the party who alleges that the act is valid, notwithstanding that fact, to make the proof showing either that the act done was one of the excepted ones, or that the person performing the act was one of the persons excepted from the provisions of the statute.

Having come to the conclusion that the petition was wholly ineffectual under the statute to authorize the appellant to demand the bonds of the town, or to authorize the officers thereof to issue and deliver them to the appellant, and that the plaintiff is not in such situation in regard to the transaction as to prevent him from invoking the aid of the court for the purpose of prohibiting the threatened illegal proceedings on the part of the appellant and town officers, it becomes unnecessary, in the disposition of this case, to pass upon the constitutionality of the act under which the proceedings were had.

The appellant's council makes objection to the taxation of costs, and insists that it was error to tax all the costs against this appellant; that they should have been taxed jointly against all the defendants, or, if not so taxed, the costs for serving the papers upon the other defendants should not have been taxed against him. We are inclined to hold that the question of costs was very much within the discretion of the circuit court. The action is an equitable one, and there does not appear to be any injustice in taxing the costs against the party who is in fact the real and only party in interest as a defendant. The town officers in this case made no defence. They were wholly indifferent between the plaintiff and the company, and still they were very proper, if not necessary, parties to the action. The court in its discretion charged the company with the costs of the action, and we are not prepared to say that there was any abuse of discretion in so doing.

By the Court.—The judgment of the circuit court is affirmed.

See Yonoski *v.* State, infra.

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FRANK YONOSKI et al.

v.

THE STATE OF INDIANA.

(*Advance Case, Indiana. March* 10, 1882.)

The defendants were indicted for having been engaged at common labor on Sunday. The evidence showed that they were servants of a railroad company and were engaged, on that day, in taking up an old switch and putting in a new one, and that the work could not be accomplished in less time than eight hours; that the work could not have been done on any day of the week except Sunday without delaying four of company's trains; that the track of the company was then in a very bad condition, and it was then engaged in taking up the old iron and replacing it with steel. *Held*, the work was one of necessity within the meaning of the statute.

By the word "necessity" is meant, not a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of each particular case.

GEORGE E. ROSS, for appellants.

D. P. Baldwin, Attorney-General, and W. W. Thornton, for the State.

The appellants were indicted for a violation of the following statute: "Whoever . . . is found on the first day of the week, commonly called Sunday, . . . at common labor, or engaged in his usual avocation, works of charity and necessity only excepted, shall be fined."

The opinion of the court was delivered by

HOWK, J.—This prosecution was commenced upon affidavit, before a justice of the peace of Pulaski County, on the 21st day of Sept., 1881. The affidavit charged in substance that on the 18th day of Sept., 1881, at said county the appellants, Frank Yonoski, Abra Timmins, T. B. Fowler, and Pat Purcell and one Dagne Winn, who were all at that time over fourteen years of age, said day being the first day of the week, commonly called Sunday, were found unlawfully at common labor and engaged at their usual vocation, to wit, then and there working on the track of the Pittsburg, Cincinnati and St. Louis R. R., such common labor and usual vocation, not being then and there work of charity or necessity, and the said appellants and Dagne Winn not being then and there persons who conscientiously observed the seventh day of the week as the Sabbath, nor travellers, a family removing, keepers of a toll gate or toll bridge, or ferrymen acting as such, contrary to the statute, etc. On the trial of the cause before the justice, the appellants were each found guilty as charged in the affidavit and judgment was rendered against each of them for a separate fine and costs, and from this judgment they appealed to the circuit court. There the State moved

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the court for leave to file a substituted affidavit, which motion was granted, and over the objection and exception of the appellant the State was permitted to file such substituted affidavit. On arraignment thereon and a plea of not guilty the issues joined were tried by a jury, and a verdict was returned, finding the appellants guilty as charged and assessing their punishment at a fine in the sum of eight dollars. The appellant's motion for a new trial, and the separate motion of each of them in arrest of judgment, were severally overruled by the court, and to each of these rulings they and each of them excepted. Judgment was then rendered against all the appellents jointly for the fine assessed and the costs of the prosecution.

The appellants here assigned as errors the following decisions of the circuit court:

1. In overruling their motion to dismiss the cause for the want of a sufficient affidavit.
2. In permitting the State to file a substituted affidavit.
3. In overruling the motion for a new trial; and
4. In overruling the motion in arrest of judgment.

The important and controlling questions in this case arise under the alleged error of the court in overruling the motion for a new trial. The appellant's counsel concede that the evidence in the record makes out a case against each of the appellants for a violation of the law for the protection of the Sabbath, unless the evidence shows that the labor they were engaged in was a work of necessity, within the meaning of that expression as used in the statute. The appellants were the servants and employees of the Pittsburg, Cincinnati and St. Louis Ry. Co., and the affidavit charged that they were working on the track of said company's railroad. If the work in which they were engaged was a work of necessity to the railway company, within the meaning of the statute, then it is clear, we think, it was also a work of necessity on the part of the appellants as the servants of such company.

There is no conflict in the evidence in regard to the necessity for the work, or to the necessity for doing such work on the first day of the week, commonly called Sunday. The only question in the case is this: Was the work in which the appellants were engaged such a work of necessity as fairly comes within the purview and meaning of that expression, as the same is used in the statute for the protection of the Sabbath? The evidence on the point under consideration consists of the testimony of those persons who were in charge of the construction, repair and maintenance of the company's line of railway. This evidence is too long to be set out in full in this opinion, but it showed very clearly, we think, that the work in question was the taking up an old switch and putting in a new one, and could not be accomplished in less time than eight hours; that this work could not have been done on any day of the

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week, except Sunday, without delaying four of the company's trains, and that Sunday was the only day of the week on which the work could be done without delaying such trains; and that the track of the railroad was then in very bad condition, and the railway company was engaged in taking up the old iron rails and replacing them with steel rails, but the change of switches could not be made except on Sunday without the delaying of trains. We are of the opinion that the uncontradicted facts of this case clearly show that the work in which the appellants were engaged, and for which they are prosecuted, was a work of necessity within the meaning of the statute for the protection of the Sabbath. In Morris *v.* The State, 31 Ind. 189, this court cited the case of Flagg *v.* Inhabitants of Millburg, 4 Cush. 243, and quoted therefrom, with approval, the following language: "By the word 'necessity,' in the exception, we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done, which under the circumstances of any particular case, may be deemed a necessity within the statute." This view of the meaning of the word "necessity" as used in the Sunday law has been approved in a number of the latter decisions of this court. Crocket *v.* The State, 33 Ind. 416; Wilkinson *v.* The State, 59 Ind. 416; Edgarton *v.* The State, 67 Ind. 588; Turner *v.* The State, 67 Ind. 595.

Doubtless there was no physical or absolute necessity in the case at bar requiring the railway company to cause the work in which the appellants were engaged to be done on Sunday. But the necessity for doing the work on that day rather than on some other day of the week grew out of and was incident to the particular business in which the railway company was engaged; for delays in the running of its trains, and in the transaction of its business, might and probably would injuriously affect not only the company, but also the general public. Therefore it seems to us the undisputed facts of this case clearly show that the work in which the appellants were engaged was a work of necessity within the meaning of that expression as used in the statute for the protection of the Sabbath. It follows that the verdict of the jury was not sustained by sufficient evidence and was contrary to law, and for these causes the appellants' motion for a new trial ought to have been sustained.

Some other questions are discussed by counsel, but the conclusion we have reached renders it unnecessary for us to consider or decide them.

The judgment is reversed and the cause is remanded with the instructions to sustain the motion for a new trial and for further proceedings in accordance with this opinion.

The statutes upon the observance of the Sabbath are numerous, and practically the offence rests upon them. Although not entirely uniform, yet in general they provide in various terms against the doing of ordinary labor or

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business on the Sabbath, and then except out of these provisions works of charity and necessity.

The Supreme Court of Indiana, as will be seen from the principal case, are undoubtedly very liberal in their construction of the word "necessity." Other courts have refused to go to the length the Indiana court has gone. Thus in 1859 the Supreme Court of Pennsylvania held that the driver of a street railway passenger car was liable to punishment for driving the car of his company on the Sabbath. Commonwealth v. Jeandell, 2 Grant, 506; S. C., 3 Phila. 509. This was afterwards changed by statute. The contrary was intimated in Augusta R. R. v. Renz, 55 Geo. 126. Coaling a locomotive engaged in hauling live stock is a work of necessity. Commonwealth v. Conway, 8 Leg. Chron. (Pa.) 27. So the driving of a public omnibus is prohibited by the statute and it is not a work of necessity. Johnston v. Commonwealth, 10 Harris, 102.

But where a domestic servant drove his employer's family to church on the Sabbath, it was held that he was not liable to prosecution. Commonwealth v. Nesbit, 10 Casey, 398.

Neither is a lock-keep in the employ of the Schuylkill Navigation Company liable to conviction for opening the lock-gates on the Schuylkill canal to admit the passage of boats on the Sabbath, on demand of the owners or captains of the boats navigating the canal. Murray v. Commonwealth, 12 Harris, 270. And a news vender who cries and sells his papers on Sunday is liable to punishment for a desecration of the Sabbath. Teaman v. Commonwealth, 1 Phila. Rep. 460. And a driver of a coach, carrying United States mail, in pursuance of a contract with the postmaster-general, does not violate the statute, though a passenger who rides in the coach does. Commonwealth v. Knox, 6 Mass. 76. But the hiring of a carriage on Sunday by a son to visit his father creates a legal contract. Logan v. Matthews, 6 Barr (Pa.) 417.

But with respect to carrying the United States mail, it was held that the driving of a coach in which was such mail did not exempt the driver thereof from arrest on account of having driven through a crowded street of a city at a rapid rate, thereby endangering the lives of the inhabitants. United States v. Hart, Peters, C. C. 390.

One who travels from one town to another on the Lord's day for the sole purpose of visiting a friend, whom he knows to be sick, and thinks he may be in need of assistance, and of rendering such assistance as on inquiry he might find to be necessary, is travelling from charity; and in an action against a railroad company for injuries sustained while a passenger on that day, on putting in evidence that he was travelling for the purpose above stated, he is entitled to go to the jury on the question whether he was travelling lawfully or not, although he offers no evidence of the ground of his belief that his friend was in need of assistance. Doyle v. Lynn & Boston R. R. Co., 118 Mass. 195.

But travelling to visit a stranger, if no occasion of charity or necessity is shown, is no defence. Stenton v. Metropolitan R. R. Co., 14 Allen, 485. And such travellers cannot maintain an action against such a railroad company for an injury received on such day while travelling on its road. Id. Contra, Mohney v. Cook, 26 Pa. St. 342; Phil., etc., R. R. Co. v. Phil., etc., Towboat Co., 23 How, 218; Carroll v. Staten Island R. R. Co., 63 Barb. 32; S. C., 58 N. Y. 126.

The execution of a will on that day, by a testator, is not "work, labor, or business," within the meaning of the statute. Bennet v. Brooks, 9 Allen, 118; George v. George, 47 N. H. 27. A town may repair a defect in a highway on the Sabbath when it is found on that day. Flagg v. Inhabitants of Millbury, 4 Cush. 243. So a parent may travel to visit his children on that day. McClary v. Lowell, 44 Vt. 116; Gorman v. Lowell, 117 Mass. 65. And

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the letting of a carriage for the conveyance of persons on Sunday, from a belief that it is to be used in a case of necessity or charity, though no such case in fact exists, will not subject the owner to a criminal punishment. Myers v. State, 1 Conn. 502.

Gratuitously assisting, aid, or a matter of kindness, to clear out a wheelpit on the Lord's day, for the purpose of preventing the stoppage on week day of the defendant's mills, is not a work of charity, so as to enable the party so assisting to recover his damages for an injury received while so assisting. McGrath v. Merwin, 112 Mass. 467. The fact that fields are suffering for want of hoeing does not make the hoeing of them on the Lord's day a work of necessity. Commonwealth v. Josselyn, 97 Mass. 411. A person walking out for the purpose of simple exercise and taking air on such day can recover of the city for an injury sustained by reason of a defective street. Hamilton v. Boston, 14 Allen, 475. But not so of one who works at night and sleeps in the day time, who travels on that day for the purpose of seeing his master to endeavor to get him to change his hours of labor. Connolly v. Boston, 117 Mass. 64. It is not a violation of the statute for a husband and wife to hire a horse to attend the funeral of the husband's brother-in-law. Horne v. Meakin, 115 Mass. 326.

A person cannot legally travel on that day to supply fresh meat to marketmen whom his master has agreed to supply therewith, although he could not do this, in addition to his other work, on Monday morning, and his master, by reason of illness, is unable to do it himself. Jones v. Andover, 10 Allen, 18. He who travels on that day to see whether a house he intends to move into the next day has been cleaned ready for his exception violates the statute. Smith v. B. & M. R. R. Co., 120 Mass. 490.

If a maid servant, without any fault on her part, is prevented from returning from her mother's house to her employer's on Saturday evening, her employer is justified in using his horse and carriage to bring her to his house on the morning of the Lord's day, that she may prepare needful food for his family, and may maintain an action against a town for an injury to his horse caused by a defect in the highway. Crosman v. Lynn, 121 Mass. 121.

So it was held that feeding hogs on Sunday was a lawful work; and if, according to the circumstance of the particular case, the usual and proper means to feed them, according to the practice of good husbandry, is to gather the necessary feed daily in the field, haul it to the feeding place, and there feed it to them, such work is not unlawful. Edgerton v. State, 67 Ind. 588. Likewise hervesting on that day "dead ripe" wheat, which could not be cut sooner and which might be spoilt by rain if left until a later day, is not a desecration of the Sabbath. Turner v. State, 67 Ind. 595. Marketing watermelons that are ripe, and which may be lost if not attended to on that day, is not unlawful on the Sabbath. Wilkinson v. State, 59 Ind. 416. But gaming is an act of common labor. State v. Conger, 14 Ind. 396. Bailing sugar water on that day is not unlawful. In Foltz v. State, 33 Ind. 215, it was held that selling cigars on Sunday was a work of common labor. But this case was overruled in Carver v. State, 69 Ind. 61, where it was held that such a work was one of necessity. In this case there was a sale by a hotel-keeper to one of his guests. The case of Carver v. State was modified in that of Mueller v. State, 76 Ind. 310, so far as its language could be held applicable to any sale of cigars except by a hotel-keeper to his guests. In an early case in this same state it was held that the making of a promissory note was common labor within the meaning of the statute. Reynolds v. Stevenson, 4 Ind. 619.

In Massachusetts it was held that gathering sea weed, at ten o'clock at night on the Sabbath, on the beach and carrying it off, and from which beach the next tide would wash away, was not a work of necessity. Commonwealth v. Sampson, 97 Mass. 407. It was left an open question whether,

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if a whale happened to be stranded on the shore on that day, it would be lawful to work to capture him. Id. So where an owner of a carriage was attending a funeral, and while returning drove out of the usual and direct course to his home to enable a friend to make a call, and was injured by a defect in the highway, it was held he could not recover from the town his damages. Davis v. Somerville, 128 Mass. 594. A young lady who on the Lord's day walks one fourth of a mile to her aunt's house, calls there and invites her cousin to walk, and then proceeds with her three fourths of a mile, simply for exercise in the open air, does not thereby violate the statute against travelling on Sunday. O'Connell v. Lewiston, 65 Me. 34. No action is maintainable to recover damages for injuries sustained on Sunday, by reason of a defect in a highway, by a person while he was walking to the house of a friend to spend the evening for pleasure. Tillock v. Webb, 56 Me. 100. See Bryant v. Biddleford, 39 Me. 198; Crotty v. Bangor, 57 Me. 423. So no action to recover damage lies against the bailee of a horse and carriage hired for pleasure on that day who by his carelessness and negligent driving injures the property bailed. Parker v. Latner, 60 Me. 528. Walking for pleasure is not a violation of the statute in this state (Maine), and if one while so walking enters a shop and purchases a glass of beer and then continues his walking and is injured by a defect in the highway he can recover of the town, unless the beer contributed to produce the injury. Davidson v. Portland, 69 Me. 116. In Missouri the fact that a grocery keeper permits persons to enter his grocery on Sunday and drink intoxicating liquors will not sustain an indictment for violation of the Sunday law; the act done by him must be for the accommodation of customers in general and in continuation of the usual business of the week. State v. Crabtree, 27 Mo. 232. See on same subject, Lambert v. State, 8 Mo. 492; State v. Ambs, 20 Mo. 214. An agreement to publish an advertisement does not subject the party so agreeing to criminal punishment. Sheffield v. Balmer, 52 Mo. 474. But see Smith v. Wilcox, 25 Barb. 341, for a case containing the same statement of facts but decided directly opposite. So for a case directly opposite the Indiana case, where the defendant was charged with cutting wheat on Sunday, and fined therefor. See State v. Goff, 20 Ark. 289. In this state the participators in a game of cards for amusement may be indicted and convicted. Bales v. State, 19 Ark. 220; Stockden v. State, 18 Ark. 186. Where the defendant hired a horse of the plaintiff on Sunday to go on that day to a distant town, and went several miles beyond the town, and while so doing caused the death of the horse by over-driving, it was held in an action of trover joined with case that the plaintiff could recover, notwithstanding the statute prohibiting all secular business on that day, upon the ground that there is a distinction between wrongful acts which constitute a mere breach of the contract, requiring on the part of the plaintiff the proof of the contract, or an essential part of his case, and wrongful acts that are independent of the contract and toward which the contract stands in a mere incidental relation. Frost v. Plumb, 40 Conn. 111. Work necessary to secure the public safety, by the safe-keeping of a felon, or delivering him to bail, is a work of necessity. Johnston v. People, 31 Ill. 469. In publishing a notice required by law to be published for six days, when one of the publication days occurs on Sunday the publication on that day cannot be counted. Scammon v. Chicago, 40 Ill. 146; Jenks v. Chicago, 48 Ill. 297; Weld v. Rees, Id. 428; Chicago v. Vulcan Iron Works, 93 Ill. 227. The statute of Kansas prohibits labor or the performance of any work on Sunday. Under this statute it was held that making a contract on Sunday was not prohibited by it. Johnson v. Brown, 18 Kan. 529; Birks v. French, 21 Kan. 238. This is contrary to the decision in Indiana, where it was held that making a promissory note was a violation of the Sunday law. See also Merritt v. Earle, 29 N. Y. 120; Kaufman v. Haven, 30 Mo. 387; Bloom v. Richards, 2 Ohio St, 387. In an action

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for damages resulting from the frightening of plaintiff's horse by defendant's dog, it was held that the fact that the accident happened on Sunday while the plaintiff was riding on a business errand would not defeat his right of recovery. Schmidt v. Humphrey, 48 Iowa, 652. Swapping horses on Sunday is a violation of the statute prohibiting labor on that day. Murphy v. Simpson, 14 B. Mon. 419. But the mere acceptance of a promissory note in pursuance of a contract made on another day is not. Ray v. Callett, 12 B. Mon. 533. See Dohoney v. Dohoney, 7 Bush, 221. In Johnson v. Barque Cyane, 1 Sawyer, 539, it was held that a seaman had no right to refuse duty required of him on Sunday by our calendar, it appearing that at the port of Ounalaska the day, owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal.

At an early date (1844) it was held in North Carolina that profanation of Sunday by performing labor on that day was not an indictable offence in that state. State v. Williams, 4 Ired. 400. This was afterwards changed by statute, and such an offender is punishable, but only before a justice of the peace. State v. Brooksbank, 6 Ired. 73.

Where it is not otherwise designated by statute, Sunday includes the twenty-four hours beginning and ending at midnight. Shaw v. Dodge, 5 N. H. 462.

Impounding swine unlawfully at large on Sunday by a hog-reeve is a work of a "secular calling" and prohibited by the statute, and the hog-reeve is a trespasser for so doing. 4 N. H. 153. Travelling on Sunday to make a social call is not a violation of the statute prohibiting "any play, game, or recreation." Corey v. Bath, 35 N. H. 531; Dutton v. Weare, 17 N. H. 34. Giving a note, in the presence of his wife, to a third person, was held to be secular work to the disturbance of others within the meaning of the statute. Varney v. French, 19 N. H. 233. See Smith v. Foster, 41 N. H. 215.

In Rhode Island the letting of a horse on Sunday for hire is unlawful. Whelden v. Chappell, 8 R. I. 230. But trover will not lie to obtain possession of such horse, or for damages to him. Smith v. Rollin, 11 R. I. 464. See the case cited from Connecticut.

The hirer of a horse, in New York, is liable to an action for negligence, though the contract of hiring was made on Sunday. Harrison v. Marshall, 4 E. D. Smith, 271; Nodine v. Doherty, 46 Barb. 59. It is no defence for a personal injury that the parties at the time were practising an unlawful game. Etchberry v. Levielle, 2 Hilt. 40.

By travelling on Sunday the traveller is not prohibited from presenting his check at the end of his journey and claiming his luggage. Jones v. Norwich and N. Y. Transfer Co., 50 Barb. 191.

To wait upon customers and sell his wares is the common labor of a merchant. Bloom v. Richards, 2 Ohio St. 387. This last case overruled Sellers v. Dugan, 18 Ohio (O. S.), 489, where a single sale on Sunday of four hundred bushels of corn was held void because it was an act of common labor. See also Cincinnati v. Rice, 15 Ohio (O. S.), 225.

Works of necessity within the meaning of the statute are not limited to labor for the preservation of life, health or property from impending labor. The necessity may grow out of, or indeed be incident to, the general course of trade or business, or even be an exigency of a particular trade or business, and yet be within the exception of the act (works of necessity). Hence the danger of navigation being closed may make it lawful to load a vessel on Sunday if there be no other time to do so. So held a work of necessity to load certain cars and trucks, which had been sold and agreed to ship on a vessel on Sunday, where the vessel was about to sail and her master would not take the cars unless shipped on that day. McGatrick v. Wason, 4 Ohio St. 566.

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In Oregon making a contract on Sunday is held to be an act of common labor. Smith v. Case, 2 Ore. 190. Making an ascension in a balloon on Sunday from a public garden for a compensation is a violation of the New York statute against work on Sunday. Brunnett v. Clark, 1 Sheld. 500.

But for a barber to shave his customers is a necessary labor. Commonwealth v. Jacobus, 1 Leg. Gaz. 491; 17 Pitts. L. J. 154.

In Wisconsin it was held that town officers must repair the highways on Sunday when the defect was occasioned the night before, in order to escape civil liability on account of an accident occasioned by a defect therein, and that a statute prohibiting secular labor on that day had no application. Alexander v. Oshkosk, 33 Wis. 277. Nor is it a defence that a person was navigating a canal on Sunday, contrary to the statute, which will prevent his recovery for damages for an injury received resulting from the negligence of the canal company. McArthur v. Green Bay, etc., Canal Co., 34 Wis. 139.

Where a town board of supervisors is authorized by law to issue bonds in aid of a railroad only upon the presentation of a petition therefor signed by a certain number of tax payers of the town, the procuring and affixing such signatures on Sunday is "business" within the meaning of the statute. Such a petition confers no authority upon the board to issue the bonds. DeFroth v. Wis. and Minn. R. R. Co., 52 Wis. 320. So is loaning money. Troewert v. Decker, 51 Wis. 46.

By 29 Car. 2, c. 7, § 1, no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's day, works of necessity and charity only excepted. Under this statute it was held that was not within the statute, even though he work with his own hands; and that the term "labor" as therein used extends to an agricultural laborer. Reg v. Silvester, 10 Jur. (N. S.) 360; 33 L. J. M. C. 79. See Reg v. Cleworth, 12 W. R. 375; 9 L. T. (N. S.) 682; 4 B. & S. 927. Whether hay-making is a work of necessity is a question of fact under which the finding of the justices before whom a party is convicted under this section must be taken as conclusive. Id.

By Car. 1, c. 1, no carrier with any horse, nor wagonmen with any wagon, nor carman with any cart, nor wainman with any wain, nor drovers with any cattle, shall by themselves or any other travel upon the Lord's day. It was held that the driver of a stage van was subject to the penalties of this section for travelling on Sunday. Rex v. Middleton, 3 B. & C. 164; 4 D. & R. 824. But the driver of a stage coach was not. Sandiman v. Breach, 7 B. & C. 96; 9 D. & R. 796.

A local act for a parish in which was a large cattle market enacted that it shall not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle during Sunday. *Held*, that a person driving a van, in which were calves being conveyed to market, was not driving or conducting cattle within the meaning of the statute. Triggs v. Lester, 1 L. R., Q. B. 259; 14 W. R. 279; 13 L. T. (N. S.) 701.

Baking puddings and pies and such things for dinner on Sunday is not an offence within 29 Car. 2, c. 7; but for a baker to bake loaves of bread on that day in the usual way of his trade is indictable because that is not a work of necessity. Rex v. Gonnger, 5 T. R. 449; S. P., Rex v. Cox, 2 Burr. 785.

A power given a canal company to make by-laws for the government of the company for the good and orderly using of the navigation, and of warehouses, wharves, etc., and for the well governing of the bargemen, does not authorize them to close the canal on Sundays by a chain suspended across it, and a by-law for so closing the canal on Sundays is illegal and void. Calder and Hebble Navigation Co. v. Pilling, 14 M. & W. 76; 3 Railway Cases, 785; 9 Jur. 377; 14 L. J. Exch. 223.

So the sale of liquor upon the Sabbath has been held as common labor

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upon that day, and the salesman was liable to punishment therefor even though there was a special statute prohibiting the sale upon that day, and providing special punishment for violation of its provisions. Voglesong v. State, 9 Ind. 112; Eitel v. State, 31 Ind. 201, is in harmony with the preceding case. See also Vogel v. State, 31 Ind. 64; Mayer v. State, Id. 204. So in other states a sale of liquor under like circumstances is held to be common labor. Elsner v. State, 30 Tex. 524; Archer v. State, 10 Tex. App. 482; Albrecht v. State, 8 Tex. App. 318; Omit v. Commonwealth, 9 Harris, 426; State v. Eskridge, 1 Swan (Tenn.), 413.

Contra, Hull v. State, 4 Harr. (Del.) 132. See Hudson v. Geary, 4 R. I. 485; Reg v. Whitely, 3 H. & N. 143; Commonwealth v. Naylor, 10 Cas. 86. Such a law has been frequently held constitutional. State v. Ambs, 20 Mo. 214. In Ex parte Newman, 9 Cal. 502, the Supreme Court of California decided that a law to restrain common labor on Sunday was unconstitutional; but in Ex parte Andrews, 18 Cal. 678, the former decision was overruled and such a law held to be valid. Specht v. Commonwealth, 8 Barr. 312; Shover v. State, 5 Eng. (Ark.) 259; Voglesong v. State, 4 Ind. 112; Lindenmuller v. People, 33 Barb. 548; Commonwealth v. Colton, 8 Gray, 488; Shover v. State, 10 Ark. 259; Usener v. State, 8 Tex. App. 177; Nuendorf v. Duryea, 69 N. Y. 557; State v. Gurney, 37 Me. 149; State v. Barker, 18 Vt. 195; Commonwealth v. Harrison, 11 Gray, 308; Commonwealth v. Jeandelle, 2 Grant, 506; S. C., 3 Phila. 509; Schlit v. State, 31 Ind. 346; Faltz v. State, 33 Ind. 215; State v. Anderson, 30 Ark. 131; Commonwealth v. Crowther, 117 Mass. 116.

Neither is the statute unconstitutional because it deprives those who conscientiously keep the seventh day of the week as the Sabbath of an extra day of the week. Commonwealth v. Has, 122 Mass. 40; Specht v. Commonwealth, 8 Barr. 312; Commonwealth v. Hyneman, 101 Mass. 30; Commonwealth v. Wolf, 3 S. & R. 48. See Stansbury v. Marks, 2 Dall. 213. And that, too, where the statute makes an exception in favor of those who conscientiously observe the seventh day of the week and permits them to labor on Sunday, while it forbids those to labor on Sunday who do not observe the seventh day, even though it creates a monopoly in trade in favor of those observing such seventh day. John v. State, 77 Ind. See Commonwealth v. Louisville, etc., R. R. Co., 6 Am. and Eng. R. R. Cas.

ST. L., I. M. AND S. RY. CO.

v.

MORRIS.

(35 *Arkansas Reports*, 622. *November Term*, 1880.)

The grant of a right of way across one's lands to a railroad company is no license to it to overflow the grantor's lands by the unskilful construction of a levee on the right of way.

The statute of limitations of three years applies to actions against a railroad company for overflowing one's land by the building of a levee, and commences as soon as the levee is completed.

A railroad company building a levee across a branch which overflows, and thereby causing a greater overflow of adjoining lands, is not relieved from damages therefor by making ditches and trestles that carry off the water as fast as the branch would when not overflowed.

Railroad companies, acting within the limits of their franchises, and using due skill and care in the construction and operation of their roads, and having the right of way, are not liable as trespassers, nor for injuries to outside

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property which are the natural and unavoidable effect of the road.

Damages for overflowing land by the construction of a railroad levee cannot be diminished by the enhanced value given to the land in common with other lands in the vicinity by the presence of the road.

The rule for assessing damages for overflowing land by the construction of an embankment is, to take the actual value of the land at the completion of the work, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as before the construction of the embankment, and fix the damages at the difference.

APPEAL from Jackson Circuit Court.

Hon. William Byers, Circuit Judge.

Winfield, Dodge and Johnson, for appellant.

Charles Minor, contra.

EAKIN, J.—Morris, the owner of a tract of land in Jackson county, for the consideration of a dollar gave a right of way across the same to the defendant railway company.

On the thirteenth of July, 1876, he brought this action at law against the company; alleging, in substance, that it had wrongfully erected an embankment upon the line of its road, and built a trestle near the lands, and was continuing the same, whereby it caused the waters of Lye branch and White River to overflow them, and rise higher and remain longer upon them than before, with other injuries; that his lands were rendered unsalable and unfit for tillage. Prayer for damages.

The defendant answered, putting in issue the wrongful construction of the embankment and trestle, the overflow of the lands and all other injuries. It pleaded also the statute of limitations of three years, and specially:

That the road was constructed by the Cairo and Fulton R. R. Co., a corporation organized under our state laws, to which plaintiff had granted the right of way. That the embankment and trestle were necessary, and that they were constructed in a prudent and skilful manner, and that the injuries (if any) were unavoidable. Also, that the lands in question were rendered more valuable by the construction of the railroad.

The plaintiff amended, to show that the defendant was the successor of the Cairo and Fulton R. R., and upon these pleadings the cause went to the jury.

There was a good deal of evidence pro and con, as to the effect upon the lands produced by the embankment and trestle. The preponderance of it, as shown in this transcript, is to the effect that a solid road-bed embankment was built across a wet-weather stream which drained an area of several square miles, and that at a considerable distance from the natural crossing the company left an open trestle, and endeavored by a ditch to drain off the water through that. The effort seems to have been ineffectual. The proof justified the jury in finding that damage had resulted from

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want of due care and skill. Whether the court erred in instructions remains to be considered.

The court, on motion of plaintiff, instructed the jury, in effect:

1. That if defendant constructed the road-bed in the vicinity of the lands so as to obstruct the natural flow of water in Lye branch, and alter the natural drain, and thereby injured the lands by overflowing them, they should find for the plaintiff.

2. In that case the measure of damages is the difference in the market value of the lands just before the construction of said road-bed, and just afterwards; in estimating which damages the jury should consider only the direct benefits to the plaintiff's lands from the construction of the road, not affecting other lands in the neighborhood.

3. That notwithstanding the grant of the right of way, it was the duty of the company to construct its road-bed in a skilful and careful manner, or be liable for failure.

4. That the statute of limitations is three years.

For the defendant, the court instructed:

That if more than three years had elapsed from the time of the injury to the bringing of the suit, it would be barred; and further:

That if the benefit to the land resulting from defendant's own acts in the construction of the road-bed, equalled or exceeded the damage, they should find for defendant.

It refused to instruct, on defendant's motion, as follows:

1. That if the land was worth as much after the road was built as before; or,

2. That the road-bed was constructed and completed across the branch more than three years before the suit was brought; or,

3. That plaintiff granted the right of way over his lands, in consideration of one dollar and the benefits to be derived from the road; or,

4. That the damage resulted not from diverting or damming a running stream, but surface water; or,

5. That if defendant, after diverting the stream by the embankment, made artificial drains down the embankment and through the trestle, and back into the natural bed below, and that said ditches were sufficient to carry off the water as rapidly as the branch when not overflowed; or,

7. If the damages were not produced by the defendant's unlawful entry on the land, and taking the same for the use of the road-bed, but was a matter happening outside of the limits of its road-bed; they must, in either case, finding the facts, give a verdict for defendant.

The court also refused to instruct for the defendant: That the measure of damages was the difference between the damage done by the natural overflow of the land, and the natural character of

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the seasons, which would otherwise have resulted without the road being built, and the damage caused by it.

During the trial and after the evidence, defendant asked and was refused leave to plead the statute of limitation of two years, under the act of January 22, 1865, section 4. The refusal was proper, as the act does not apply to this case.

The jury returned a verdict in favor of plaintiff for $2,965.50, for which judgment was entered. Defendant moved for a new trial, which being refused, he excepted and appealed.

Exceptions to instructions given for plaintiff, and refused for defendant, as well as to the verdict on the evidence, were duly saved by motion for a new trial.

The first instruction given for plaintiff is correct, taken in connection with the third. The grant of the right of way certainly was no license to the company to injure plaintiff by unskilful work. If it is to be considered at all it should, in conscience, have imposed upon the company an obligation to be tender of the property rights of the donor.

The statute of limitations of three years applies to this case, as the court properly instructed, and it began to run as soon as the company had finished its work about the embankment, trestle and ditches. Until that was done, it could not be said that the embankment itself had caused any injury. If the open trestle and ditches had been properly located, and skilfully completed, there would have been no damage, nor cause of action. There was evidence to support the verdict on this point.

The consideration of plaintiff's instruction on the measure of damages will be taken up in connection with that asked by defendant.

There was no evidence that the injury was caused by the obstruction of surface water. Lye branch was, by all the evidence, a stream with a defined bed, but sluggish. It is not necessary, in this case, to define the difference between the two cases.

The fifth instruction was properly refused. It was not sufficient to construct the works so as to carry off the water as rapidly as the branch would "when not overflowed." Streams do overflow, and engineers should provide reasonably against that also by openings of sufficient capacity, or property holders would be left to the mercy of the elements.

The seventh instruction asked by defendant presupposes that a right of entry upon, and use of, land for road purposes, absolves the company from all liability for injury to other lands outside of the road-bed. This is a misapprehension of the true and rational doctrine.

Railroads exercise franchises granted by the state for the public good. The companies invest large sums for the use of these franchises, looking, however, only to the individual profit of the stock-

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holders. Both interests are to be kept in view, and protected. If the companies act within the limits of their franchises, and use due skill and caution in the construction and operation of the roads, and acquire the right of way, they cannot be made liable either as trespassers, or on account of detriment to outside property, which is the natural and unavoidable effect of the road. Some places are rendered less valuable, or endangered, by the mere vicinity of a railroad, constructed with the utmost care. It will bring less in market. This is the misfortune of the owner. But the public good requires that he shall submit to it, or railroads could not be built and run with private capital. But there is no case, whether with regard to lands inside or outside of the limits of the right of way, in which railroads or individuals may injure the property of others by the negligent and unskilful exercise of a right, without a corresponding liability. That would be shocking to justice, and violate a principle of common law which admits of no exception.

The really important question in this case regards the true measure of damages—the liability being once fixed. A few principles are well settled. The defendant cannot diminish them by such appreciated value given to the lands as is common to other lands in the vicinity, and which results from the conveniences of the road. Each citizen is entitled to that, and his full share of it. It is not matter of grace from the corporation, and it may not wantonly or carelessly defeat it.

It is held in a number of cases that the company may claim, in diminution, such appreciations of value as result to the land from the direct material operations of the company upon or near it, and which are special. For instance, an embankment may operate as a levee and reclaim lands from overflow; or ditches to relieve road-beds from water may operate as drains, and reclaim wet lands. The principles of justice upon which these decisions are based are not so obvious at first glance, as it seems a non sequitur that because the road must benefit the owner in some respects, it may injure him to a corresponding extent in others. There it nothing in this case to require a determination of this last point.

The instruction given for plaintiff is in the language of some of the cases. Generally it is correct to say that the measure of damages to any property is the difference in its value just before and just after the injury. But it is plain that this can only be the true measure where the damage itself is the sole element affecting the value. Here were railroad works some time in construction, during which there may have been great shrinkage of value in all sorts of property. If the works had been done, never so skilfully, there may, still, have been a great difference between the values of the land before the embankment was begun and when work on the ditches ceased. The instruction was misleading.

That asked on this point by defendant was substantially correct,

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but calculated to embarrass and confuse a jury. Properly understood, it has the support of a recent case in the Queen's Bench, quoted in a note to Mr. Sedgwick's work on Measure of Damages, p. 137, mar. It is a rule difficult of application, and in this case would have required the jury first to fix the value of the land as entirely free of injurious water—then to estimate the damage done by nature—then the damage done by nature and the road together, and take the difference. The evidence did not afford data for these calculations.

The true rule, and the one in this case easily applicable by a jury of practical men, was to take the actual value of the land at the time the work was completed, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as formerly, and fix the damages at the difference. This allows all appreciation of land to complainant, and affords just compensation for want of care and skill.

For error in giving the second instruction of plaintiff, reverse the judgment, and remand the cause for a new trial, etc.

See note, p. 86.

VAN ORSDAL
v.
BURLINGTON, CEDAR RAPIDS AND NORTHERN RY. CO.

(*Advance Case, Iowa. June* 20, 1881.)

A railroad was located across plaintiff's farm, and constructed over two sloughs, from which the water, in its natural state, flowed in a pure stream. In constructing the road one of the sloughs was dammed up, the water diverted, and carried over loose sand and dirt to the other, the loose sand and dirt being thereby carried upon plaintiff's land, and deposited to his injury. *Held*, that it was competent to testify as to the value of the land with the slough dammed and its value with a culvert under the road, so as to allow the water to flow in its natural course; that as the action was based on negligence in constructing the road, it was not material that other roads were constructed in the same manner. A party is entitled to have a stream of water flowing through his lands remain unobstructed, and if its course is diverted to his injury, to recover damages therefor. Action held not barred by the statute of limitations.

APPEAL from Buchanan Circuit Court.

Action to recover damages sustained by plaintiff by reason of a stream of water being diverted in the construction of defendant's railroad, whereby sand and earth was washed upon and deposited on plaintiff's land. Judgment upon a verdict was rendered for plaintiff. Defendant appeals.

J. & S. K. Tracy and D. W. Bruckhart, for appellant.

Husner & Van Orsdal, for appellee.

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BECK, J.—1. The petition alleges that the defendant's railroad is located upon plaintiff's farm, and crosses two sloughs thereon, the water of which, in the natural state, was clear and pure, and ran over a grassy bottom; that, in the construction of the railroad, one of the sloughs was dammed, and the water thereof diverted from its natural course, and conducted for a long distance through loose sand and dirt into the other slough, over which a culvert was constructed; that the water flowing through the loose sand and dirt from the first-named slough bore a large quantity thereof, which was deposited upon plaintiff's land; that by means of "the faulty construction" of the railroad, which has not been changed, plaintiff has sustained damages, and that the injury from the deposits made upon his land is permanent, and commenced in July, 1876. The defendant, in its answer, alleges that the railroad was constructed in 1873, and that the defendant became the owner thereof in 1876, and denies any negligence or unskilfulness in the construction of the road. It is averred that if any cause of action ever existed it accrued more than five years before the suit was commenced, and is, therefore, barred by the statute of limitations.

2. The plaintiff testified that his farm, "without the railroad constructed so as to dam up the slough," would be worth $25 per acre. He was then asked the present value of the farm, with the railroad constructed as it is, without a culvert over the slough. Objections to this question were overruled, and the plaintiff answered that it is worth $21 per acre. The admission of this evidence is the ground of the first objection to the judgment urged by defendant's council. It is insisted that the evidence should have been limited to the value of the land immediately before and after the road was built in order to show plaintiff's damages. But the injury was not sustained upon the completion of the road, and did not occur till the expiration of three years after. The evidence could not have been directed to the time immediately before and after the building of the road, for no injury had then occurred.

3. It is further insisted that the claim of plaintiff is based upon the injury to the use of the land, and not to the land itself. We do not so understand the pleadings. The injury complained of is alleged to be a permanent injury to plaintiff's farm.

4. The defendant offered to prove by an engineer that the railroad is built as railroads are usually constructed in such locations. The evidence was rejected. The issue raised by the pleadings involves the question of negligence in the construction of the road in crossing the slough without a culvert. The custom or practice of building railroads cannot be the ground of defeating recovery for negligence. If it were so, the rights of land owners would depend upon the "usual manner of building railroads." But his rights are absolute, and not dependent upon the will or acts of railroad companies. A stream of water cannot be diverted from its natural

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DEXTER R. WRIGHT, ATTORNEY AT LAW NEW HAVEN

channel to his injury. Stoghill *v.* C. B. and Q. R. Co., 43 Iowa, 26. A railroad company cannot defeat an action for damages based upon such a diversion of a water-course, on the ground that its road is constructed in the usual manner.

5. Certain instructions are objected to in the third point of counsel's argument, on the ground that plaintiff does not claim to recover for the negligent construction of the road. We understand the pleadings to raise the issue of negligence. The record fails to establish the fact upon which counsel's objection is based.

6. An instruction is to the effect that if it was practicable for defendant to construct a culvert or other means for the passage of the water of the slough, and the omission so to do caused injury to plaintiff, he is entitled to recover. Counsel for defendant insist that it may have been practicable to build the culvert, and yet there was no negligence in failing to do so. We think differently. The law secures to plaintiff the right of an unobstructed passage of the streams of water running through his land in their natural channel. If, in the construction of the road, a stream is diverted to his injury, he may recover. Stoghill *v.* C. B. and Q. R. Co., supra. If the distinction is erroneous, it is too favorable to the railroad company, which cannot, therefore, complain.

7. The injury to plaintiff's land, complained of in the petition and shown by the evidence, was permanent. Defendant insists that it occurred when the road was built, in 1873, and that the action is therefore barred by the statute of limitations. But the petition alleges that the first injury sustained by plaintiff was in 1876, and the jury, by a special verdict, so found. The statute of limitations began to run from that date. Powers *v.* City of Council Bluffs, 45 Iowa, 652. This action was commenced in 1879. It is, therefore, not barred by the statute.

We have considered all questions discussed by defendant's counsel, and discover no error in the record. The judgment is affirmed.

See note, p. 86.

MILLS
v.
G. AND C. R. R. CO.

(13 *Shand's* [*S. Car.*] *Reports*, 97. *Feb.* 25, 1880.)

The breaking of a culvert under the embankment of defendant's road, in a freshet, having caused an accumulation of water, which, the embankment being opened, overflowed plaintiff's land to his damage, the circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff, no matter how much care and caution they exercised. *Held*, erroneous,

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and that the defendant was not liable unless guilty of negligence in setting free the accumulated water.

BEFORE MACKEY, J., Greenville, April, 1878.

Action by Otis T. Mills against the Greenville and Columbia R. R. Co. for damaged one to his crops of corn, etc., in June, 1876. Action commenced October, 1876.

Brushy Creek, near the city of Greenville, passed through a culvert under an embankment, over which the track of the defendant company passed. During a freshet in the month of June, 1876, the culvert fell in, and the flow of the stream being thereby obstructed, the water accumulated in large quantities up the channel of the creek and on the lands adjacent, and covered a highway. Several days afterwards the road-master, with his employees, cut an opening in the embankment, through which the water passed off, slowly at first, but with increasing volume as the opening was enlarged by the action of the waters, when it flowed with the force of a freshet; and damage was thereby done to the lands of the plaintiff below. It was for such damage that this action was brought. The testimony showed that the freshet which broke the culvert was extraordinary.

The presiding judge ruled, during the examination of a witness, that "it makes no difference how the company let the water off; whether the greatest possible care was exercised. If the company let the water off and it flowed upon plaintiff's lands and damaged the same, the company is liable." And he charged the jury that if the company's agents let off the water and damage ensued to the plaintiff's land, the defendant is liable for the actual damage sustained, no matter how much care and caution they exercised. To this ruling and charge the defendant excepted.

Verdict for plaintiff for $375. The defendant appealed, alleging error in the ruling and charge, to which exceptions were taken.

Mr. I. M. Bryan, for appellant.

The company, by its charter, had the right to construct the dam or embankment, bound only to the exercise of ordinary care that it should not injure others, but not liable for injuries arising from extraordinary causes. The testimony shows that the culvert was amply sufficient for even more than ordinary storms. 8 Bush, 404; 27 L. J. Exch. 417; 12 Me. 238; 56 Penna. St. 445; Angell on Water-courses, § 348; Sherm. & Redf. on Neg. §§ 445–576. These authorities show that the company were not responsible for the presence or accumulation of the large body of water above their embankment, and that the same came about by the operation of the vis major. Finding the water there after the storm was over, what was the defendants' duty in the premises? They were common carriers and bearers of the mail; the water was backed over a public highway leading into the city of Greenville, and cov-

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ered the lands of third parties. It was their duty to let this water off, exercising as much care and caution as possible; if carelessly done, the defendants were liable; otherwise, not. Had the floods carried away the embankment and injured the plaintiff's lands, the company would clearly not be liable. This case should be distinguished from the class of which Fletcher *v.* Rylands, L. R., 1 Exch. 265, and 3 H. L. 330, is a leading authority. But in our case the defendants did not turn loose a dangerous element which had been introduced by themselves upon the premises; the rule in our case is ex damno sine injuria non oritur actio. 2 W. Bl. 898; 8 B. and C. 360; 16 Ark. 308; Hill & Den. 193; 8 Wis. 255; 1 Add. on Torts, 3. Again: Necessitas inducit privilegium quoad juria privata. In such cases the owner is liable only in the absence of ordinary care. 5 Vt. 371; 10 Allen, 306; Angell on Water-courses, § 337.

No counsel appeared for respondent.

WILLARD, C. J.—The action was for damages to the plaintiff's land by water flowing in a natural water-course, but in unusual quantities, due, as alleged, to the following facts: The water-course in question had become choked up at a point above the plaintiff's land, where it passes the embankment for the defendant's railroad, by a culvert, and an extraordinary accumulation of water had been occasioned. The defendant's servants made an opening by which the water thus accumulated should flow into the water-course below the obstruction, and thus flow along its natural channel. The flow of water thus caused was alleged to have occasioned the damage complained of.

The charge of the circuit judge dispensed with the necessity of a finding of negligence on the part of the defendants and placed the plaintiff's right of recovery on two facts, namely, that it should appear that the defendants' servants discharged the accumulated water into the water-course, and that such water caused the damage in question.

The cause of the damage was water in a natural water-course moving in obedience to its own laws; it was not, therefore, a case of actual trespass. The question, then, was whether the damage was consequential to an unlawful act of the defendants or their servants acting under their authority. It is the concurrence of damage and injury that constitutes the only ground of defendants' liability. The plaintiff could not sustain injury unless the act of the defendants, either in its nature or the mode of its performance, was unlawful. Removing an obstruction to the flow of water in a natural water-course on the defendant's land, is in itself a lawful act, and as such no ground for alleging injury. When a lawful act is performed, which, in its nature, is liable to occasion injury to the person or property of another, the law charges the party per-

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forming such act with the duty of exercising care and skill in its performance. The neglect of this duty is legal negligence, and it is in a legal sense the proximate cause of any damage directly resulting from it, although such damage is immediately occasioned by the operation of natural laws.

The question for the jury was, then, whether the defendants were guilty of negligence in the mode in which the accumulated water was set free in the water-course. It was error to place the liability of the defendants on grounds that rendered it unnecessary for the jury to inquire as to the existence of such negligence.

There must be a new trial.

McIver and McGowan, A. J.'s, concurred.

See note, p. 86.

The Cairo and Vincennes R. R. Co.

v.

Stevens.

(73 *Indiana Reports*, 278. *May Term*, 1881.)

The owner of land may, upon the boundaries thereof, not interfering with any natural or prescriptive watercourse, erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands he is not responsible; but such waters as fall in rain and snow upon his lands, or come thereon by surface drainage from or over contiguous lands he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse.

From the Daviess Circuit Court.

S. P. Wheeler, W. H. DeWolf and S. N. Chambers, for appellant.

H. D. McMullen and D. T. Downey, for appellee.

Woods, J.—This suit was commenced in the Knox Circuit Court, and the venue changed to Daviess county, where a trial was had, resulting in a judgment for the plaintiff below, from which the defendant prosecutes this appeal.

The complaint contains but one paragraph, and alleges that the plaintiff, on the 1st day of January, 1872, was, and ever since has been, the owner of certain lands therein described, situated in the lower prairie below Vincennes, containing about two hundred acres. After the description of the lands, the complaint proceeds in the following words: "And the plaintiff further avers that the defendant, in the year 1872, built and constructed a large embankment of earth and stone and gravel, ten feet high and one hundred

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feet wide, over and across the southern portion of the said land hereinbefore described, and that said embankment extended from the north line of said land, southwardly across said land and for a distance of ten miles south of the south line of said land, and the plaintiff says that the natural flow and drainage of the said land was over and across the land upon which the said embankment is now constructed, and also over and across the land lying immediately south of the land herein described, and from thence across and over the land now occupied by said part of said embankment south of the land hereinbefore described; and the plaintiff says that the defendant carelessly, negligently and unskilfully built and constructed said embankment, and failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge or drain in, through or under said embankment, whereby the water coming on the land hereinbefore described, could escape, and the plaintiff says that within five years last past, the water falling upon the said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been stopped and hindered by said embankment from flowing off of said land, and during the month of August, 1875, the water being so stopped and hindered arose to the depth of eight feet upon said land, and entirely destroyed one hundred acres of growing corn, and carried away one thousand panels of fence that enclosed said land, and that, since the time of the construction of said embankment, the water has continually overflowed the said land, so that the same has become almost entirely worthless, and the plaintiff says that the said embankment was and is the only cause of the water so overflowing the plaintiff's land. Wherefore the plaintiff demands judgment," etc.

The complaint proceeds on the theory that the defendant was lawfully in possession of its right of way across the land described and for the distance of ten miles southward, but whether by condemnation or by purchase is left to conjecture. The defendant was therefore guilty of no trespass in entering upon its said right of way, and in making all proper and necessary excavations and embankments for the construction of its road-bed. The gist of the complaint is in the averments that the defendant "failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge or drain in, through or under said embankment, whereby the water coming on the land hereinbefore described could escape, and that within five years last past the water falling upon said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been stopped and hindered by said embankment from flowing off," etc. No attempt is made to charge an interference with any natural watercourse, but only with the flow of surface water and waters overflowing from the river and spreading over the adjacent bottom

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or low lands. The question presented is, therefore, whether the defendant, having acquired a right of way for the construction of its railroad, and having found it necessary or expedient to raise its track above the natural surface of the land, owed any duty to the plaintiff to provide culverts or other means of passage through its embankment, for the surface water or water overflowing from the river and descending in that direction from or over the lands of the plaintiff. If upon the facts of the complaint such duty existed, a careless and negligent breach thereof, together with actionable damages, is shown, and the complaint is good. If such duty did not exist, the complaint is not good.

Washburn, in his work on Easements and Servitudes, pp. 353 and 355, supporting himself mainly by references to writers on the civil law, says: "It may be stated as a general principle, that, by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows, and the like, upon one, naturally descends on the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field.

"The owner of the upper field, in such case, has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements."

This is doubtless the rule of the civil law, and has been adopted by the courts of last resort in some of the States of the Union, but it is not the common law doctrine, and is not generally prevalent in this country.

Dillon, in his work on Municipal Corporations, speaking of the surface water, says: "This the law very largely regards (as Lord Tenterden phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. . . . On the one hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to the graduation, improvement, and repair of streets, without being liable for the consequential damages caused by surface water to adjacent property." Section 798, and notes. To the same effect are Angell, Water-courses, sec. 108; 1 Addison, Torts, 105; Cooley, Torts, 574; Hillard, Torts, 584; Taylor *v.* Fickas, 64 Ind. 167, and cases cited; Schlichter *v.* Phillipy, 67 Ind. 201.

The case of Taylor *v.* Fickas, supra, is fully in point, and must be regarded as having settled the doctrine for this State on the subject. The facts of the case, in brief, were, that the owner of the lower land had planted, near the upper line of his land, a row of trees for the purpose of keeping back the driftwood, which was ac-

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customed to be carried on and over his land by the overflow of the Ohio River. The result, which must have been anticipated, and was therefore presumably intended, was that the driftwood, lodging against this row of trees, accumulated on the adjacent land above, and either destroyed or greatly depreciated the value thereof. It was held, however, that no action lay for the obstruction, and citing many of the American, and some of the English cases on the subject, it was declared that waters percolating the soil, or contained in hidden recesses, without a known channel or course, surface waters, and waters overflowing from contiguous streams or rivers, "fall within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above;" and, citing the case of Gannon *v.* Hargadon, 10 Allen, 106, the following statement of the law was adopted as our own: "The right of an owner of land to occupy and improve it it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. . . . The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."

In the more recent case of Templeton *v.* Voshloe, 72 Ind. 134, this court held, "that the owner of the upper field may not construct drains or excavations so as to form new channels on to the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the wash upon the same. The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field."

The court, however, took pains to add that, "As to where and under what circumstances the owner of the lower field may obstruct or direct the flow of surface water which naturally descends upon his land, we need not inquire, as that question is in no way involved in the proper decision of this cause."

It is difficult to invent a formula for the statement of a rule of law which will accurately express the rule in its application to varying circumstances; and it may be that there is some verbal

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inconsistency in the formulas quoted from these opinions of this court, but when applied to the subject-matter of each there is no inconsistency of principle involved or expressed. The one has to do with the land owner's conduct in guarding his possession against the encroachments of surface and flood waters from without, and the other with the discharge of such waters from his own land on to that of another. With reasonably near approximation to accuracy, it may be laid down as a general rule, that upon the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. This is in accordance with the general principle, that such waters are a common enemy which each proprietor may fight off as he will; but, once on his land, they become his property (in a qualified sense, of course), and the maxim applies, "Sic utere tuo, ut alienum non lardas." We hold, therefore, that the complaint fails to show an actionable injury.

Judgment reversed, with costs and with instructions to sustain the demurrer to the complaint.

See note, p. 86.

CAIRO AND VINCENNES R. R. CO.

v.

ANTHONY HOWRY.

The breaking of a culvert under the embankment of defendant's road in a freshet, having caused an accumulation of water, which, the embankment being opened overflowed plaintiff's land to his damage, the circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff. no matter how much care and caution they exercised. *Held*, erroneous, and that the defendant was not liable unless guilty of negligence in setting free the accumulated water.

APPEAL from the Knox Circuit Court.

W. H. De Wolfe and S. N. Chambers, attorneys for appellant.

Canthoin and Boyle, attorneys for appellee.

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WOODS, J.—Complaint in three paragraphs by the appellee against the appellant; answer in general denial to the whole complaint, and to the third paragraph a special plea, setting up a license from the plaintiff to the defendant to do the things alleged in that paragraph. Trial, verdict, and judgment for the plaintiff.

The appellant has assigned error upon the overruling of his motion for a new trial.

The first and second paragraphs of the complaint are in all essential respects the same as the complaint in the case of the same appellant *v.* Stevens, 73 Ind. 278. The third paragraph alleges a trespass by the appellant upon the land of the appellee, and in support of this, proof was made that the appellant, after its track had been washed away by the flood of 1875, had built and maintained for a few weeks a temporary track upon the lands of the appellee. By answers to interrogatories it is shown that the jury assessed the damages for this trespass at one cent, and that the remainder of the damages assessed—to wit, $230—was allowed upon first and second paragraphs of the complaint. In the case of the appellant *v.* Stevens, supra, the general rule was declared that upon the boundaries of his own land, not interfering with any natural or prescriptive water-course, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters to the injury of other lands he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural water-course. This is in accordance with the general principle that such waters are a common enemy which each proprietor may fight off as he will; but once on his land they become, in a qualified sense, his property, and the maxim applies, "Sic utere trio ut alienum non laedas."

In that case the question arose upon the demurrer to the complaint, and it was held that the complaint did not show an actionable injury. Here the question arises upon a motion for a new trial, for the alleged reasons that the verdict is contrary to the law and the evidence, and that the damages assessed are excessive.

The motion should have been sustained.

The judgment is reversed with costs.

See note, p. 86.

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SHANE

v.

THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. R. Co., Appellant.

(71 *Missouri Reports*, 237. *October term*, 1879.)

A land owner has no right by erecting an embankment, to stop the natural flow of surface water, or to divert its course so as to throw it upon the land of his neighbor. Overflowed water from a river, in time of flood, is surface water within the meaning of this rule. HOUGH, J., dissenting.

APPEAL from Jackson Circuit Court. Hon. S. H. WOODSON, Judge.

Affirmed.

B. F. Stringfellow, for appellant.

NAPTON, J.—This action was to recover damages from the defendant for the destruction of five acres of vegetables the plaintiff had in the Missouri River bottom, charged to have been occasioned by the embankment of defendant's road-bed constructed across a slough, without any culvert, by reason of which in the summer of 1873 a rise in the Missouri River and heavy rain-falls in the vicinity were prevented from pursuing their accustomed natural channel to a lake and thence to the river again. By reason of this obstruction, the waters of the overflowed river and the excessive rains were thrown upon the plaintiff's land and destroyed his crops. We insert the testimony and the instructions, from which the points in issue will be more readily ascertained than from the details of the petition.

William Shane, plaintiff, testified as follows: In 1873 I occupied the land described in the petition, which was owned by my wife; had four and one half acres in cultivation—two acres in corn, one and one half acres in potatoes, and one acre in garden vegetables. All this crop was destroyed on the 7th or 8th day of July by water which had overflowed the banks of the Missouri River. The water in the river was very high. It overflowed the bank at a low place, and passing in was stopped by the embankment of defendant's land. It then ran along defendant's road to my wife's land and overflowed it, thus destroying my crops. The low place at which the water was obstructed by the road was about half a mile north of my land. The low place or slough was about one hundred feet wide and five or six feet deep, and ran from the river to a lake about a mile, and from the lake again about a mile the slough passed again into the river. Through this the water from overflows of the river in times of flood had passed before the road was

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built. I went on the land in the spring of 1871, and have lived there from that time to the present. In July, 1873, the water was from three to three and one half feet deep on the land, and remained two or three weeks. The crops were all destroyed; the house surrounded by water. I was compelled to remove, and could not safely return for eight or nine weeks. There was no trestle or culvert in defendant's road for passage of water at the low place or from thence to plaintiff's land. The water stood on the land as deep as it did in 1867, though in 1867 the water in the river was three feet higher. The road was not built in 1867.

On cross-examination, witness said: In 1867 the water came from the low place or slough spoken of on to my land. In 1873 the water was to within one and one half or two feet of the top of the road. Have known this land since 1866. The water in floods of the Missouri River has been in the slough as far as the road three or four times in that time; never been out of the slough except in 1867 and 1873. The slough was not wet land, but was generally cultivated, never had water in it except from floods in the Missouri River. The bank of the slough is higher on the north side. Think that from highest part of the bank at distance of 100 feet there is a bank two feet high; this is not a steep bank but a gradual rise. 150 yards from highest the ground is two or three feet higher than lowest, and at 400 yards is four feet higher than lowest. This land is surrounded by higher land.

Austin Chouteau, for plaintiff, testified: Lived in 1873 within 150 yards of plaintiff. Knew his crops: two acres corn, one and one half acres potatoes, one acre vegetables, all destroyed. Have lived there thirteen years. When the water of the river in time of flood got over its bank before the road was built, it passed through a place called a slough to a lake and thence to the river below. It is about one fourth of a mile from river to railroad, about a mile to lake, and about two miles to river below. The slough was, in low places, three to four feet deep; in others, two to three feet and from fifty to 100 feet wide. It ran from the river east and was crossed by the embankment of the road running from north to south. There was no culvert in the road where it crossed the slough.

Cross-examined: Since 1863, the river overflowed its banks at the slough five times; has never overflowed the banks of the slough but twice, viz.: in 1867 and 1873. In 1867, 1873 and in 1876, these years are the only times the river water has got in the slough as far as the road. In 1876 it did not get to plaintiff's land. It was one and a half or two feet deep in slough in 1876 at road. In thirteen years the water has only interfered with crops in the slough twice. When the road was made, a ditch was made along the road from the slough to Shane's, by taking earth for the embankment. Through this the water passed to Shane's land. The water in 1867 was three feet higher than in 1873. Water of 1867 overflowed

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Shane. Water of 1873 would not have overflowed Shane but for the railroad embankment.

Wagner, for plaintiff, testified: The slough starts from the river with high banks. Water is prevented from passing through it by the road. A culvert in the road at the slough would have carried the water into the lake and prevented its overflowing plaintiff's land.

Flint, for plaintiff, testified: Have lived within one hundred yards of Shane's land since 1865. Know what is spoken of as a slough. It is low ground near the river. It has no distinct banks. As it runs east the banks get higher. At the railroad the north bank is five feet higher than the lowest place. On the south side there is no distinct bank. In some places it seems nearly level; in others about one and a half feet, rising very gradually. It runs east from the river about one mile, and from the lake to the river again below. In 1873 the river overflowed its banks; water came through this low place to the railroad and nearer to plaintiff's land. But for the railroad the flood of 1873 would have passed on east and not have overflowed plaintiff. The water in the river in 1867 was three feet higher than in 1873. The water would have overflowed the banks of the river in 1876 but for an embankment erected by witness and others in 1875 and 1876.

On cross-examination Flint said: I have known the land since 1865. The river overflowed in 1867 and 1873. One other time since 1865, date forgotten, it got out, and part of the distance to the railroad. I yesterday made an examination of the ground with the engineer of defendant. There are several low places, one north of the one spoken of. The slough or lowest ground was in cultivation in 1873 and before that date. The crop in the slough was destroyed in 1873, and would have been in 1875 and 1876 but for embankment. That embankment was of dirt. This bank was highest at the river. The railroad was finished in 1869. There was no water in this low ground then. I think the land in the slough was cleared and inclosed on the east side of the railroad before the road was built. This was lower than on the west side, next the river. It has been in cultivation ever since. The water stayed so long on Shane's land because it had no outlet, his land being lower than adjacent lands.

Lewis, for defendant, testified: I am now employed by defendant as its engineer; have been engaged as a railroad engineer since 1866. A dirt bank is better and safer as a bed for a railroad than such a bank with a culvert or other opening, if such an opening can be dispensed with. The low place spoken of by the witnesses does not indicate, except in times of great floods in the Missouri River, any necessity for any culvert or opening in the road-bed for the passage of water. At the time of the construction of the road I was employed as an engineer by defendant, and had occasion to

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know the character of the low ground spoken of. The road at that place was built in the winter of 1868 and 1869. There was no water in this low place at that time. The place spoken as a slough is not wet land, but is merely low ground, its level varying as other low ground along the Missouri; it has no defined banks. I measured its levels yesterday. The ground is highest at the north side. The highest ground at the bank of the railroad is three feet five inches higher than the ground at a distance of 118 feet. Then going south 150 feet from this lowest point it rises gradually one foot eight and a half inches, thence south 100 feet it falls gradually one foot eleven inches, then south 250 feet it rises gradually one foot eight and a half inches, then 200 feet nearly west, thence 480 feet it continues with scarcely perceptible variations, finally attains a height of one foot two inches higher than last point, thence it falls gradually to plaintiff's land, 740 feet, where it is three feet lower than last point. In the whole distance of about 1900 or 2000 feet, the level only varies about three feet.

On cross-examination witness said: An embankment is considered safest without a culvert. One reason is that culverts are liable to wash out when floods come, and drift wood and other debris may fill the culvert and injure it or the bank adjoining it. I cannot say whether it would have been more expensive to put a stone culvert into this embankment at the time it was built or to make the bank of dirt, because I do not know the relative cost of stone and earthwork at that time. All railroads have a large number of culverts. Two or three that I have built have washed out. I built one on the St. Joseph and Denver road at a place at which water appeared to have flowed, though I could not learn whether any great quantity of water had flowed there. I suppose this drain commenced about two miles from where the culvert was placed. I thought it necessary to put a culvert there. A flood afterwards washed it out. So long as a culvert is in good condition the road-bed is as safe as without it.

Thereupon the court, of its own motion, gave the following instructions to the jury:

1. If the jury believe from the evidence that for a number of years prior to the building by defendant of its railroad in Clay county, there existed south of plaintiff's premises a natural drain or slough through which the surplus water of the Missouri River, in high stages, usually and naturally passed without overflowing plaintiff's land, and that in constructing its said railroad defendant made an embankment across said drain so as to obstruct and dam up the surplus water of said river so flowing in said drain, and that by reason of said obstruction the surplus water of said river in the year 1873, during a high stage thereof, was by reason of said embankment obstructed, dammed up and precipitated upon the land of plaintiff, thereby destroying or injuring his crops growing or being

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thereon, and depriving him of the use of the building on the same, then they must find for the plaintiff and assess his damages at the market value of said crops at the time, on the ground, and the monthly value of the buildings during the time he was necessarily deprived of their use, and the necessary expense of removing from and returning to the same, with six per cent interest per annum from the time of said injury, provided the jury also believe from the evidence that the defendant, by the construction of a culvert or other means of escape for said water, at a reasonable expense and without injury to its said road, could have thereby prevented said injury to plaintiff.

2. Water which escapes from the banks or natural channel of a running stream by reason of a flood in the stream occasioned by heavy rains or the melting of snow, is not subject to the law applicable to running streams, but is like surface water, and it may be obstructed or its course changed by the erection of banks necessary for a road-bed, without subjecting the defendant to damages for injury caused by such obstruction.

3. If the jury find that the injury complained of was caused by an embankment erected by defendant, and which was a necessary and proper embankment for the construction of defendant's railroad, they will find for defendant.

To the giving of each of which instructions the defendant objected, and, its objection being overruled, excepted.

The defendant, thereupon, asked the court to give the following instructions:

1. If the jury find from the evidence that the obstruction to the flow of water complained of in the petition was an embankment erected by defendant for its road-bed, and that the same was erected several years before said injury and had been used for such road-bed from its erection to the date of such injury, they will find for defendant.

2. The defendant had the right, in constructing its road, to throw up embankments across low places, and thereby obstruct the passage of water which in time of floods might overflow the banks of a stream and flow against defendant's road, and is not liable for injury from such obstruction.

3. Defendant was not bound to construct culverts or ways for the passage through its road-bed of water, which, in times of floods, should pass out of or over the banks of some stream adjacent to such road but not obstructed by such road-bed, and is not liable for damages caused by such failure.

4. If the jury find that the injury complained of was caused by an embankment erected by defendant, and which was a proper embankment for the construction of defendant's road they will find for defendant.

5. Water which escapes from the banks or natural channel of a

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running stream, by reason of a flood in the stream occasioned by heavy rains or the melting of snow, is not subject to the law applicable to running streams, but is like surface water, and it may be obstructed by the erection of banks necessary for a road-bed, without subjecting the defendant to damages for injury caused by such obstruction.

6. Defendant had the right to construct its road-bed in the usual and proper manner by throwing up and raising the ground for its way-bed and erecting ditches along the side to keep the water off from the track of the road; and if defendant made its road-bed and ditches with reasonable skill and plaintiff was accidentally injured thereby by the flow of water overflowing the banks of the Missouri in an excessive flood, as charged in the petition, he cannot recover.

All of defendant's instructions, except the 6th, were refused.

The plaintiff had a verdict for $450, and after a motion for a new trial and in arrest judgment was entered and an appeal taken to this court. It is hardly necessary to observe to those who are familiar with the decisions in the United States concerning surface water, that an irreconcilable difference of opinion has exhibited itself in regard to the rights and duties of adjoining proprietors of land. This difference may be traced, I imagine, to the great importance attached by the courts on one side to the maxim "sic utere tuo ut alienum non laedas," whilst those adopting a contrary view seem disposed to give unlimited effect to the maxim "cujus est solum, ejus est usque ad coelum," and therefore leave every proprietor to take care of himself, except where living streams are concerned. The case of McCormick *v.* K. C., St. Jo. and C. B. R. R., 70 Mo. 359, essentially depends on the same principles, governing the present case. The facts in that case, it is true, are quite the converse of those now to be considered, but the principle involved is the same. That case was one where the owner of the dominant heritage collected the surface water, percolating through a thousand channels, by an embankment, into a mass, and through a culvert in the embankment precipitated it thus accumulated upon the servient or lower heritage. This case is where the owner of the servient heritage, by artificial obstacles, stops the flow of the surface water and throws it back from its natural channel upon the owner of the higher ground.

The decision referred to adopts the principles decided in Pennsylvania, New Jersey, Ohio, Illinois, Louisiana, North Carolina and Iowa, said to be traced to the civil law, but from whatever source derived, in our judgment, based upon sound reasons of equity and justice, which are summarily stated by Pothier in the following words: "Each of the neighbors may do upon his heritage what seemeth good to him, in such manner, nevertheless, that he doth not injure the neighboring heritage." Kauffman *v.* Griesemer, 26

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Pa. St. 411; Earl *v.* DeHart, 12 N. J. Eq. 280; Butler *v.* Peck, 16 Ohio St. 334; 49 Ill. 487; Minor *v.* Wright, 16 Lou. Annl. 151; Overton *v.* Sawyer, 1 Jones Law R. 308; 21 Iowa, 164; Martin *v.* Jett, 12 Lou. R. 501. In the case of Livingston *v.* McDonald, 21 Iowa, 164, the Supreme Court of that State, through that eminent jurist, Judge Dillon, carried the doctrine declared by this court in McCormick *v.* K. C., St. Jo. & C. B. R. R., to the extent of determining that a subterraneous ditch which increased the quantity of water upon the lower heritage, or, without increasing the quantity, threw it upon the lower field in a different manner from what it would have flowed naturally, made the proprietor of the upper heritage responsible for the damage, and Judge Dillon remarks in conclusion: "We recognize the fact (to use Lord Tenterden's expression) that surface water or slough water is a common enemy which each land owner may reasonably get rid of in the best manner possible; but in relieving himself he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable."

By the same reasoning, as was observed by the Supreme Court of Illinois in Gillham *v.* Madison Co. R. R. Co., 49 Ill. 487, the reverse of the proposition must be true, that the owner of the lower heritage cannot, by an embankment or other artificial means, obstruct the natural channel through which the surface water is accustomed to flow, and throw it back upon the upper proprietor. In a later case in Illinois (Gormley *v.* Sanford, 52 Ill. 160), the decision in Gillham *v.* Madison Co. R. R. was reiterated, and it was again held that the owner of the servient heritage has no right, by embankment or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. The remarks of Mr. Justice Lawrence in this case are worthy of observation and apply a fortiori to the present case, and we therefore copy them: "This question has already been decided by this court in Gillham *v.* Madison Co. R. R. Co. . . . In the opinion filed in that case we said, although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface water, was not only the clear and well settled rule of the civil law, but had been generally adopted in the common law courts both of this country and in England. Various cases bearing on each side of the question are cited in that opinion, and it is not necessary to cite them again. This rule was thought by this court in that case to rest upon a sound basis of reason and authority, and was adopted. We find nothing in the argument or authorities presented in the present case to shake our confidence in

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the conclusion at which we then arrived. In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water-course fed by remote springs, applies with equal force to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field, are wont to flow. What difference does it make in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction. It is suggested in the argument, if the owner of the superior heritage has a right to have his surface waters drain upon the inferior, it would follow that he must allow them so to drain, and would have no right to use and exhaust them for his own benefit or to drain them in a different direction. We do not see why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule, at once so equitable and so easy of application, as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land."

I confess for myself that, like Mr. Justice Lawrence, I am unable to perceive the distinction between surface water coming, as he says, from the clouds, and that which rises in a spring, especially in this case, where the surface water comes from the Rocky Mountains, a thousand miles from where the overflow of the Missouri River occurs, occasioned as it is, not by rains or snows in its vicinity, but by the melting of snows upon the mountains and by the accession of a thousand tributary streams. But it must be considered as well settled that this overflow of the Missouri is what is in law termed surface water.

In Kauffman *v.* Griesemer, 26 Pa. St. R. 408, the instructions of the judge who tried the case were, that the water which the defendant obstructed was not a living stream, but came from rains and snows, but that the accustomed, though not continuous, flowage of such water was in the eye of the law a stream, and no more to be obstructed than if it was a channel of a continuous stream that never failed. These instructions were approved by the supreme court, and that court observes that: "The plaintiffs had no right to insist upon his receiving waters which nature never intended

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should flow there, and against any contrivance to reverse the order of nature he might peaceably take measures of protection." In Martin *v.* Riddle, 26 Pa. St. 415, Judge Lowrie says: "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position. . . . Hence, the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields."

The Supreme Court of Ohio, in Butler *v.* Peck, 16 Ohio St. 343, unhesitatingly adopted the principle thus decided in Pennsylvania. The question in that case was "whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the water collected on it, has no outlet, may lawfully throw such water by artificial drains upon the land of an adjacent proprietor." The court say, "We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and those altitudes may not be artificially changed to the damage of an adjacent proprietor."

In North Carolina, the supreme court, in Overton *v.* Sawyer, 1 Jones L. R. 308, observed: "The defendant had a right to have the water allowed to pass off his land through the natural drain; and when the plaintiff, by means of the embankment across this natural drain, obstructed the water and interfered with this right, the latter (the defendant) had a cause of action against the former, for causing the obstruction."

What is said by the court of errors in New Jersey, in the case of Earl *v.* DeHart, 1 Beas. R. 280, seems to conform to Mr. Justice Lawrence's views in the Illinois case we have cited, and to apply to the slough, or swale, or hollow through which the waters of the river passed when they overflowed its banks, and across which the defendant's road was built. The chancellor says: "The facts admitted in the answer show that this is an ancient stream or water-course, and that it is a natural water-course, in the etymological use of the term. A water-course is defined to be a channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in case of a ditch or other artificial means used to divert the

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water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land. It is an ancient water-course, if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient water-course, and as such legal right can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed off, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient natural water-course."

The court, therefore, held, that where the surface of the ground is such as to collect water at different seasons of the year to an extent which requires an outlet, and if such is always the case in times of heavy rains and melting snow, and if that flow of water produced a natural channel through the lands of different persons where such accumulated surplus water has always been accustomed to run, a court of equity would protect such channel from obstruction to the injury of any one through whose land it runs. This corresponds with the view of the judge in Kauffman *v.* Griesemer.

The judge who tried this case observes: "The declaration speaks of a stream of water being used to flow. There is no stream in the usually received sense of that word, as being a continuous flowage of water. The water that flowed down was such as came from springs which do not seem ever to have had a continuous flow that reached defendant's land, and such as came from rains and snows. But the accustomed, though not continuous flowage of water, is a stream in the eye of the law, and its channel is no more to be obstructed than if it was the channel of a stream that never failed. . . . Whatever is the natural direction of the excess of waters in floods and freshets, as in seasons of ordinary water, must be left as nature has made it; no one has a right to divert it from himself and cast it upon his neighbor to save himself at the expense of another."

Of course the immemorial usage spoken of in the New Jersey case can hardly be claimed here, since there was no witness in the case who spoke of having any knowledge of the river floods beyond thirteen years before the trial, but the question as to this slough being the natural channel through which the waters of the Missouri River passed in times of floods, was put to the jury in an instruction given by the court, and was found by the jury, and upon

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the evidence submitted, they could not have found otherwise than they did, for upon this point all the witnesses were agreed, though they could not speak of time immemorial, beyond which the memory of man did not reach.

The principles which are at the bottom of this case, if taken from the civil law, a system which, as Judge Dillon remarks in Livingston *v.* McDonald, "embodies the accumulated wisdom and experience of the refined and cultivated Roman people for a thousand years, and though not binding as authority, is of great service to the inquirer after the principles of natural justice and right," and from which many of the usages of the common law and equity courts both in England and this country are derived, were recognized by this court as early as the case of Laumier *v.* Francis, 23 Mo. 181, in which the opinion of this court was delivered by Judge Leonard, when associated with judges Scott and Ryland, all three of whom are well known in this State, and have been in the front rank of our most eminent jurists.

We deem it unnecessary to refer particularly to the decisions in Louisiana, as they are uniformly in conformity with the principles of the cases already cited from Pennsylvania and other States. On the other hand, the cases in Massachusetts and several other of the New England States, following the case of Gannon *v.* Hargadon, 10 Allen, 106, adopt the rule of allowing every proprietor to control surface water as he pleases, without regard to contiguous proprietors. Still, as even in these States this right is carefully distinguished from similar rights where a water-course exists by grant or prescription, it is not entirely certain how the courts would apply these doctrines to a case like the present. So in New York the general principle asserted in Gannon *v.* Hargadon seems to be maintained in Goodale *v.* Tuttle, 29 N. Y. 459, where Judge Denio says: "In respect to the running off of surface water, . . . I know of no principle which will prevent the owner of land from filling up the wet and marshy places in his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it." This is a mere reiteration of the doctrine of "sauve qui peut," or as popularly translated into our vernacular "the devil take the hindmost." We prefer that asserted by this court in Laumier *v.* Francis, and repeated in McCormick *v.* K. C., St. Jo. and C. B. R. R.

Nor do we think that equitable and just principles, as we understand it, will materially retard agricultural operations or improvements. The facts in the present case show that the defendant could have built a rock culvert at the crossing of this hollow, at about the same cost with the dirt embankment. The engineer seems to have been misled by the dry and rich soil which extended to the very bottom or the lowest part of the swale, portions of which were in cultivation, and although the road was equally strong and

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safe with a rock culvert or a dirt embankment, the engineer preferred the latter, as "not so liable to wash out when floods come; and drift wood and other debris fill the culvert and injure it or the bank adjoining it." The first instruction given for the plaintiff contained all the law necessary to enable the jury to pass upon the facts submitted, and the second and third, and the sixth given for defendant certainly cannot be complained of by defendant. The judgment of the circuit court is affirmed.

SHERWOOD, C. J., and HENRY and NORTON, JJ., concur.

HOUGH, J., Dissenting.—I adhere to the opinion of this court in McCormick *v.* K. C., St. Jo. & C. B. R. R., 57 Mo. 433, the doctrine of which I conceive to be at variance with the rule adopted by my associates for this case. In the case cited, the right of the proprietor of the soil to change the flow, or obstruct the natural course of surface water, is clearly and distinctly announced in the following language: "The general rule, however, is that either municipal corporations or private persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other improvement thereon, to make it fit for cultivation or other profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country so as either to increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury. Ang. Wat. Cour., p. 122, § 108, and following, and cases there cited; Goodale *v.* Tuttle, 29 N. Y. 459; Waffle *v.* N. Y. Cen. Ry. Co., 58 Barb. 413; Turner *v.* Inhabitants, etc., 13 Allen, 291; Imler *v.* City of Springfield, 55 Mo. 119, and cases there cited. The same rule would apply to water flowing over the country, which had escaped from the banks or natural channel of a running stream of water, by reason of a flood in the stream occasioned by heavy rains or the melting of snow upon the surrounding country."

In Goodale *v.* Tuttle, 29 N. Y. 459, cited by Judge Vories in support of his opinion in the case just quoted from, Denio, C. J., said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." In Gannon *v.* Hargadon, 10 Allen, 106, Bigelow, C J., said: "The right of an owner of land to occupy and im-

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prove it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow."

In Hoyt et al. *v.* The City of Hudson, 27 Wis. 656, Dixon, C. J., after stating the rule of the civil law of dominant and servient heritage, which he rejects, proceeds as follows: "The doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow, and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion. This is the rule in England, and in Massachusetts, New York, Connecticut, Vermont, New Jersey and New Hampshire, as will be seen by the authorities cited in Pettigrew *v.* Evansville, 25 Wis. 223, and also the following: Bowlsby *v.* Speer, 31 N. J. Law Rep. (2 Vroom) 351; Dickinson *v.* Worcester, 7, Allen, 19; Chatfield *v.* Wilson, 28 Vt. 49; Swett *v.* Cutts, 50 N. H. 439; Trustees *v.* Youmans, 50 Barb. 316; Waffle *v.* N. Y. Central Ry. Co., 58 Barb. 413. Excluding from its operation surface water falling or accumulating on his own land, which, as decided in Pettigrew *v.* The Village of Evansville, the proprietor may not divert or cause to flow upon the land of another to his injury, the rule of the common law is correctly stated in Bowlsby *v.* Speer, that no legal right of any kind can be claimed, jure naturae, in the flow of surface water, so that neither its retention, diversion or repulsion is an actionable injury, even though damage ensue. An examination of the last named case will also show that the case of Earl *v.* De Hart, 1 Beas. 280, cited and relied upon in argument here, has been virtually overruled."

In Bowlsby *v.* Speer, supra, Beasely, C. J., said: "The owner of land may, at his pleasure, withhold the water falling on his property from passing in its natural course on to that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on to his own. . . . Nor does it seem to me that there is any significance in the fact that there was an appreciable channel for this surface water over the land of the de-

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fendant and into which it naturally ran. On every hill-side numbers of such small conduits can be found, but it would be highly unreasonable to attach to them all the legal qualities of watercourses. I am not willing to adopt a doctrine which would be accompanied with so much mischief." It appears from the statement of facts in that case, that the defendant built a stable over a hollow on his own land, through which the surface water was accustomed to pass, and this obstacle turned the course of the water, so that it ran on to the lot and into the cellar of the dwelling-house of the plaintiff. It was held that the plaintiff had no right of action.

In the case of Livingston *v.* McDonald, 21 Iowa, 160, in which a very able and most interesting opinion was delivered by Judge Dillon, it appeared that the water naturally flowed from the defendant's low or slough land into and upon like land of the plaintiff. The defendant constructed a mole or underground ditch about two hundred yards in length a short distance below the surface, in his slough land, which terminated in an open end or mouth near the land of plaintiff, and thus concentrated the water latterly received by it throughout its whole length and emptied it in a body upon the land of the plaintiff. This Judge Dillon decided the defendant had no right to do. Nor under the common law rule, as laid down in McCormick *v.* R. R., supra, could this have been done. But Judge Dillon, by way of caution perhaps, wisely observes in the same case that, "It may be doubted whether the common law courts in this country would adopt what seems to be the rule of the civil law, so far as to preclude the lower owner from making, in good faith, improvements, which would have the effect to prevent the water of the upper estate from flowing or passing away." On a question like that now before us, the decisions in Louisiana cannot be received as authority in this State, since, as is well known, they are based upon positive provisions of the civil code regulating the subject, in force in that State. La. Code, Art. 656. In the case from that State cited in the opinion of the majority, Duffel, J., observes: "This court has, on more than one occasion, expressly declared that a strict and rigid application of the articles of the code on the title of predial servitudes would be destructive to agricultural industry. Martin *v.* Jett, 12 La. 503; Sowers *v.* Shiff, 15 La. Ann. 300." And in the case last cited the same learned judge further said that a strict application of the articles of the code "would condemn to perpetual sterility all the rich lands in lower Louisiana bordering on the Mississippi River."

Judge Redfield in commenting upon the case of Swett *v.* Cutts, 50 N. H. 439, makes the following pointed and emphatic declarations on this subject: "It must be conceded, we think, that the right of land owners to deal with surface water and all water mixed with the soil, or coming from underground springs, in any manner they may deem necessary for the improvement or better enjoyment

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of their own land, is most unquestionable, and if by so doing, in good faith and with no purpose of abridging or interfering with any of their neighbors' rights, they necessarily do damage to their neighbors' lands, it must be regarded as no infringement of the maxim, sic utere tuo ut alienum non laedas, but must be held damnum absque injuria."

But there is a more potent reason for upholding in this State the common law rule on this subject than is to be found in all the learned judgments of the distinguished jurists whose opinions have been cited. Section 3117 of the Revised Statutes, which has been in force in this State since the year 1816, declares that the common law of England, when not repugnant to the constitution of the United States or the constitution and laws of this State, "shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding." While common law judgments are frequently illustrated by reference to the civil law, and while this court is at liberty to resort to any system of jurisprudence for a rule of action when the common law and our statutes fail to furnish one, yet when the common law does furnish a rule, under the statutes cited, I do not conceive that this court is at liberty to disregard it.

Laumier *v.* Francis, 23 Mo. 181, referred to in the opinion of the court, was an action against the defendant for levying a nuisance by accumulating a body of water on a lot in his possession adjoining a building in the possession of the plaintiff. Judge Leonard, after defining a servitude under the civil law, proceeds as follows: "We, of course, know nothing about the facts of the present case; but if such was the natural situation of these lots, and the plaintiff dammed up the water on the defendant's lot, by erecting a house upon his own, it is very obvious that he cannot recover any damage occasioned thereby to his own property. . . . In the case supposed, the plaintiff himself would be the author of the nuisance, and of course could not hold another responsible for the damages that resulted to him from his own act." The judgment of the circuit court, however, was expressly reversed upon another ground and no decision was or could have been made upon facts which were not before the court. On the facts supposed, no recovery could have been had under the common law. For example, the defendant in this case could not have recovered damages from any one for injury done to its embankment by the surface water which it had dammed up. Besides, as Judge Leonard cited the case of Cooper *v.* Barber, 3 Taunton, 99, in support of his views, there is as much ground for saying that he adopted the common law rule is there is for saying that he adopted that of the civil law. Neither rule was maintained as against the other in that case.

If the defendant in this case had constructed a culvert or other

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opening in its embankment for the passage of the flood through it upon the adjoining fields in the swale on the other side of its road, as is suggested in the opinion of the court, I do not see why the defendant would not have been liable for the injury thereby inflicted upon the owners of such fields, under the decision made at the present term in McCormick *v.* The K. C., St. Jo. & C. B. R. R. (the present defendant), 70 Mo. 359. So that if the company builds an embankment without any opening, it will be liable for the damages arising from the obstructed surface water on one side, and if it constructs an embankment with an opening it will be liable for the damage done by the surface water passing through it on the other side.

The first and second instructions given for the plaintiff are conflicting. I am of opinion that the second and third instructions asked by the defendant should have been given, and the first given for the plaintiff should have been refused, and that the judgof the circuit court should, therefore, be reversed and the cause remanded.

See note, p. 86.

MUNKRES

v.

THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. R. CO., Appellant.

(72 *Missouri Reports*, 514. *October Term*, 1880.)

A railroad company whose road was built upon a right of way granted to the company by the proprietor for that purpose, so constructed its road-bed and ditches as to collect and discharge water upon adjacent lands of the latter. In an action against the company to recover for the damages thus sustained, the evidence was conflicting as to whether the water was that of a running stream or natural water-course, or whether it was simply surface water. The trial court, after instructing the jury as to what constitutes surface water, and what a stream or water-course, further instructed them in substance as follows: 1. That if the water was surface water the company was not liable, provided its road-bed and ditches were constructed with reasonable care and skill with reference to the use of the same for railroad purposes. The company was not bound to make ditches to protect plaintiff's land from injury from surface water. 2. But if the water was that of a stream or natural water-course, and it was diverted from its natural channel, the company was liable; provided, however, that plaintiff could not recover for damages which he might have averted at comparatively small cost. The company was bound to make sufficient ditches and passages to conduct the water away and prevent it from injuring plaintiff; but if it did not do so, it was the duty of plaintiff to use all reasonable means to avert and avoid injury by the construction of ditches and levees himself within a reasonable time, if the same could

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be done at a reasonable amount of labor and expense. On appeal by the company from a verdict and judgment for plaintiff,—*Held*, that the company had no right to complain of these instructions. But see Shane v. K. C., St. Joseph & Council Bluffs R. R. Co., 71 Mo. 237; McCormick v. Same, 70 Mo. 359.

APPEAL from Andrew Circuit Court.—Hon. H. S. KELLEY, Judge.

Affirmed.

W. P. Hall for appellant.

Heren & Son and Rea & Williams for respondent.

HOUGH, J.—This was an action to recover damages for the diversion by the defendant of a certain stream of water from its natural course and channel whereby plaintiff's fields were flooded and injured. The testimony was conflicting as to whether the water diverted was that of a running stream or natural water-course, or whether it was simply surface water.

The court, of its own motion, instructed the jury as follows:

1. The relinquishment of the right of way read in evidence, authorized the railroad company to enter upon the plaintiff's lands and construct its road in the usual manner of building roads, by throwing up and raising the ground for the road-bed, and by cutting ditches along the sides of the road to keep the water off the track. If, therefore, you find from the evidence, that the road-bed and bridges were constructed with reasonable care and skill, with reference to the use of the same for railroad purposes, and the plaintiff has been incidentally injured by the collection and flow of surface water upon his lands caused by the construction of the road, he is without remedy for such injury. The railroad company was not bound to make ditches larger or longer than was necessary to secure its road-bed. It was not bound to make ditches to protect the plaintiff's land from injury from surface water which might collect along the road.

2. If the jury believe from the evidence that in the construction of the railroad, the water of a stream or branch (known as the Wells branch) was changed and diverted from its usual natural channel and course of flowage, and caused to flow in a new direction down and along the railroad track, and that thereby the whole or any part of the water of said branch so turned and diverted flowed upon and over the lands of the plaintiff (described in the petition) in the years 1870, 1871, 1872, and up to May, 1873, to the injury of the plaintiff's crops, you should find for the plaintiff, and assess his damages at such sum as you may believe from the evidence he has sustained by reason of the waters of said branch being so turned out of and from its natural channel upon the plaintiff's lands by the construction of the road.

3. The main question for the jury to determine is, whether the

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railroad company, in the construction of the road, by its embankments and ditches, diverted the water of a stream or water-course from its usual and natural channel, and caused it to flow in a new direction, whereby some part of the water so turned and diverted, was made to flow upon plaintiff's land to his injury. A water-course is a stream or brook having a definite channel for the conveyance of water. It may be made up, more or less, from surface water from rains and melting snow, but after it enters into a channel and commences to flow in its natural banks, it is no longer to be considered surface water, and it is not essential that the water should continue to flow in such stream constantly the whole year around; it is sufficient if the water usually flows in such channel, though not continually. That is, to constitute a branch or stream there must be something more than a mere surface draining, swelled by freshets and melting snow, and running occasionally in hollows and ravines, which are generally dry. The water must usually run in a definite bed or channel, though it need not flow continually the year round. But although the water from high lands and hills may unite and form a stream with a definite channel, yet if it afterward ceases to remain a channel, but spreads out over the surface of low lands, and runs in different directions in swags and flats without any definite channel, it ceases to be a stream or water-course.

4. If the jury find from the evidence that there was a stream or water-course, such as is here described, running in a westward direction from the bluffs of high lands through the bottom toward the One Hundred and Two River, and that the railroad company in the construction of its road obstructed the channel of said water course and turned its waters down the road to and upon the plaintiff's land to his injury, you should find for the plaintiff. But if you find that there was no stream or water-course; that before the supposed stream reached the railroad track it lost its channel and spread out in different directions, ceased to be a stream or water-course, you should find for the defendant.

6. If you find from the evidence that the plaintiff's lands were low and wet, or any part of them, this fact should be taken into consideration, and in estimating the extent of the injury caused by the alleged turning and diversion of the said stream, you should have regard to the actual and natural condition of his lands, and allow damages only for the injury caused by the water so turned upon them from said stream; neither should you allow for injury caused by the collection of surface water into ditches, or by stopping and turning surface water upon plaintiff's lands.

7. If the railroad company obstructed the channel of a water-course, as alleged, it was the duty of the company to make sufficient ditches and passages to conduct the water away, and prevent it from injuring the plaintiff by running upon his lands. And if the com-

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pany failed to do so, it is liable in damages for any injury caused to plaintiff by the water so diverted. But if the company failed to make sufficient ditches and passages to convey the water from said stream away without injuring plaintiff, it was the duty of the plaintiff to use all reasonable means to avert and avoid injury from such water by the construction of ditches and levees himself within a reasonable time, provided the same could be done at a reasonable amount of labor and expense, and if he failed and neglected to so protect himself, he cannot recover for damages which he might have reasonably averted. He might recover damages which accrued to him before he could have protected himself and averted the injury at a comparatively small expense, and nothing more.

If the jury believe from the evidence that the water which floods the lands of the plaintiff which lie west of the road-bed in the north-east corner of section 27, have to pass through the cattle guards in the road-bed before flooding the land in that quarter section, and that the cattle guards in said road-bed were constructed at the request of the plaintiff, then they will find for the defendant as to all damages done to lands lying west of the road-bed.

We see nothing in the foregoing instructions of which the defendant has a right to complain, and the judgment of the circuit court will, therefore, be affirmed. SHERWOOD, C. J., and HENRY, J., concur; NORTON, J., concurs in the result; NAPTON, J., absent.

See note, p. 86.

O'CONNOR

v.

THE FOND DU LAC, AMBOY AND PEORIA RY. CO.

(*Advance Case, Minnesota. June* 4, 1881.)

The fact that a railway company, in constructing its road-bed, has filled up an artificial ditch on the land of a third person, by which surface water was conducted from the plaintiff's premises to a river, and has thus turned back the water upon said premises, is no ground of action.

APPEAL from Circuit Court, Fond du Lac County.

D. Babcock and R. M. Bradford, for appellant.

Geo. P. Knowles, for respondent.

COLE, C. J.—The gravamen of the complaint is, as we interpret its allegations, that the defendant company, in making its road-bed, filled up a ditch which drained or carried the surface water from

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the plaintiff's premises to the river. We do not understand that any stream of water or water-course proper was interrupted, crossed or changed by the company in building its road, though there is some language which would almost warrant such an inference. But the better, and as we think, true construction of the complaint, is that the action is brought for damages caused the plaintiff in consequence of the defendant filling up a drain by its road-bed in the vicinity of the plaintiff's land, "thereby preventing the free passage of the surface water from the premises and the adjoining lands eastward to the river." Assuming this to be the cause of action intended to be stated, the question arises, does it show a legal injury? We are of the opinion it does not. True, it is averred that the company, unmindful of its duties in that regard, wrongfully and negligently filled up a culvert which it first built in its road-bed, and thus stopped the flow of water through the ditch. But this only raises the question whether the defendant was bound to provide a way for the escape of mere surface water from the plaintiff's premises. That question has already been settled in this state adverse to the claim of plaintiff.

In Hoyt *v.* City of Hudson, 27 Wis. 656, it was in effect decided that under the rule of the common law which exists here an owner has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors; that he may even turn the same back upon or on to the land of his neighbor, without incurring liability for injuries caused by such obstructions. The same doctrine was laid down in Pettigrew *v.* Village of Evansville, 25 Wis. 223, where the question is very fully considered; also in Fryer *v.* Warne, 29 Wis. 511. There is a discrepancy in the decisions of the different states upon this subject, because some follow the rule of the civil law, which gives a servitude on the lower in favor of the superior estate. But here the rule of the common law has been already adopted, and we see no good reason for changing it. According to that rule no natural easement or servitude exists in favor of the owner of the higher ground to the flow of mere surface water over the lower estate, but the owner of the latter may detain or divert the same without rendering himself liable in damages therefor. But this rule does not apply to a water-course, which implies a stream usually flowing in a definite channel, though it may at times be dry. Enbrick *v.* Richter, 37 Wis. 226. But a water-course does not include mere surface water which is supplied by rains or melting snow flowing in a hollow or ravine on the land. Hoyt *v.* Hudson, supra.

We place our decision upon the distinct ground that the complaint fails to show that any natural water-course, properly speaking, has been obstructed or interfered with by the defendant. The company has only obstructed a ditch which drained or carried off surface water from the plaintiff's premises. We do not think

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the defendant was bound to keep that ditch open on its own land for the convenience of the plaintiff; in other words, the owner of land is under no legal obligation to provide a way for the escape of mere surface water coming on to his land from the land of his neighbor, but has the right to change the surface of the ground so as to interfere with or obstruct the flow of such water. "The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." Bigelow, C. J., in Gannan *v.* Hargadan, 10 Allen, 106–110.

The learned counsel for the plaintiff argued the case upon the assumption that the complaint shows that a stream of water or natural water-course had been obstructed to the injury of his client; but we do not understand this to be the cause of action stated. It is quite clear the company would have no right to obstruct a water-course or divert a stream of water so as to cause damage to another without being responsible therefor. For an injury thus occasioned the company would surely be liable upon general principles as well as by virtue of section 1836, Rev. St. That liability has often been enforced by the courts. Young *v.* C. & N. W. Ry., 28 Wis. 171; Lyon *v.* G. B. & Minn. Ry., 42 Wis. 538; Brown *v.* C. & S. Ry., 12 N. Y. 486; Hatch *v.* Ver. Cen. Ry., 25 Vt. 49; Lawrence *v.* Railway, 71 Eng. Com. Law, 643; Hamden *v.* N. H. & N. Ry., 27 Conn. 158; Johnson *v.* A. & St. L. Ry., 35 N. H. 569, are a few of the many cases which might be cited in support of that proposition of law. In Waterman *v.* Conn. & Pass. Rivers Ry., 30 Vt. 610, it was held "that a railroad company may as a question of prudence and care, as well be required to have regard to the prevention of damage to a land owner, by the accumulation of surface water merely, as of a running stream, when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary, and that ordinarily what would be a reasonable performance of that duty under a given state of circumstances would be a question of fact, and not a question of law for the court." Page 615.

But the facts stated do not bring the case within the doctrine of any of the above decisions. Here, it appears, there is low land adjacent to the plaintiff's premises, the surface water from which was accustomed to flow through a ditch which was on another's land. That ditch the defendant has filled up in constructing its road-bed, and thereby turned this surface water back upon her premises, causing the injury complained of; that is, the surface of the land has been changed by the construction of the defendant's road-bed, which prevents the surface water from passing off to the east to the river. This is the cause of action stated. No stream or

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water-course has been obstructed, as we construe the complaint. We, therefore, think the facts stated do not constitute a cause of action, and that the demurrer was properly sustained.

The order of the circuit court is affirmed.

See note, p. 86.

PFLEGER

v.

HASTINGS AND DAKOTA R. CO.

(*Advance Case, Minnesota. December* 23, 1881.)

If the construction of a railroad across a farm lessens its value by preventing the flow of surface water from one part of the farm to another, this is a proper element to be taken into consideration in fixing the amount of compensation to which the owner is entitled. The rules of law governing the rights of adjacent owners, as to the flow of surface water from the land of one on to the land of the other, have no application to such a case.

It is incumbent upon an appellant to show error prejudicial to himself; and as it does not appear in this case whether the interruption of the flow of surface water complained of consisted in preventing its flow from the land of an adjacent owner upon premises of respondent, or in preventing its flow from one part of defendant's farm to another part, it will be presumed that the court below was correct, under the facts of the case, in instructing the jury that if the construction of the railroad interfered with the flow of surface water in such a way as to depreciate the value of the farm, they had a right to take it into consideration.

APPEAL from order of District Court, County of Carver.

Henry Hinds, for respondent.

L. L. Baxter and E. Southworth, for appellant.

MITCHELL, J.—This was a proceeding instituted by said railway company to condemn certain real property of Pfleger for the purposes of the road. The property proposed to be taken consisted of a right of way 100 feet wide across a farm consisting of 400 acres. The only ground of error urged here is that in giving to the jury the following instruction requested by the railway company, to-wit, "No compensation can be allowed for diverting the flow of surface water," the court erred in qualifying the same by adding: "If the construction of any permanent embankment interferes with the flow of surface water in such a way as to depreciate the value of the farm in any way, you have a right to take it into consideration."

The appellant invokes the legal principle that no prescriptive right can be acquired to the enjoyment of the flow of surface water from the lands of another; that the owner of the land from whence

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the flow of surface water comes may at any time cut it off. The application of these principles to this case depends upon the correctness of the assumption that the evidence shows that the construction of this railway prevented surface water from flowing, as formerly, from the land of an adjacent owner on to and upon the farm of respondent, and that this was one of the elements of damage for which he claimed compensation. The testimony fails to show any such state of facts. It leaves it uncertain whether the water referred to was "surface" water or the overflow of a natural water course, which, it appears, runs through the farm. But, even if it be assumed that it was surface water, it cannot be determined from the evidence as here before us whether the interruption to its flow complained of consisted in preventing it from flowing from the land of an adjacent owner, or in preventing its flow from one part of respondent's farm to another. If it was the latter, it was a proper element to be considered by the jury, so far as it affected the value of the remainder of the farm. Mills, Eminent Domain, §§ 160, 189; Morrison *v.* Bucksport R. Co., 67 Me. 353; Walker *v.* Old Colony R. Co., 103 Mass. 16.

The legal principles regarding the flow of surface water invoked by appellant have reference only to the right of coterminous or adjacent owners. But where surface water is upon a man's own premises, it is his own, and he can use it as he pleases; and if, by the construction of their road across his land, a railroad company impairs this value by preventing this water from flowing from one part of the land to another he is entitled to recover. The burden is upon the appellant to make it appear affirmatively that error was committed to his prejudice. For anything that appears in the case, the explanation or modification of appellant's request was entirely correct under the facts of the case.

The order denying a new trial must therefore be affirmed. Order affirmed.

The eight cases preceding this note constitute a valuable addition to the law on the subject of the rights and liabilities of railroad companies in regard to water-courses and surface water. The two topics are so intimately connected that it has been judged best to treat of them together. An attempt will accordingly be made to state briefly the result of the authorities upon these questions both in this country and in England. A water-course may be defined as a place where water flows in a certain direction, through a regular channel with fixed bed and banks, the flow of which is defined though not necessarily continuous. Monson *v.* R. R. Co., 67 Me. 353; Starr *v.* Childs, 20 Wend. 149; Rex *v.* Oxfordshire, 1 B. & Ald. 301; Howard *v.* Ingersoll, 17 Ala. (N. S.) 780; Wagner *v.* L. I. R. R. Co., 5 N. Y. Sup. Ct. 163; Gillett *v.* Johnson, 30 Conn. 180; Macomber *v.* Godfrey, 108 Mass. 219; Reynolds *v.* McArthur, 2 Pet. 417; Arnold *v.* Foot, 12 Wend. 330.

With regard to water-courses, the rights and obligations of railroad companies are very clearly defined. They have no right in the construction of their road to diminish the flow of the water in such streams. Shamleffer *v.* Mill Co., 18 Kan. 24; Williamson *v.* Canal Co., 76 N. C. 478.

Nor to divert or obstruct its passage in any way. Whitaker *v.* Del. &

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Hudson Canal Co., 87 Pa. St. 34; Baltimore & P. R. Co. v. Magruder, 34 Md. 79; Johnson v. Atlantic & St. L. R. Co., 35 N. H. 569; Stoghill v. C. B. & Q. R. R. Co., 43 Iowa, 26; Young v. C. & N. W. Ry. Co., 28 Wis. 171; Lyon v. G. B. & Minn. Ry., 42 Wis. 538; Waterman v. Conn. & Pass. Rivers Ry., 30 Vt. 610.

They must, therefore, where they are forced to construct an embankment, make in it suitable tunnels or culverts through which the waters of streams may pass. Chicago, R. I. & P. R. Co. v. Moffet, 75 Ill. 524; Pitts., Ft. W. & Chicago R. Co. v. Gilleland, 56 Pa. St. 445; Young v. Chicago & N. R. Co., 28 Wis. 171; Haynes v. Burlington R. R. Co., 38 Vt. 350; March v. Portsmouth & C. R. Co., 19 N. H. 372; Walker v. Old Colony & N. R. Co., 103 Mass. 1; Cott v. Lewiston R. R. Co., 36 N. Y. 214; Lyon v. Green Bay & M. R. Co., 42 Wis. 538; Valley R. Co. v. Bohm, 34 Ohio St. 114. See Van Orsdal v. Burlington, C. R. & N. Ry. Co., reported supra, p. 53.

And for a failure to construct such tunnels or culverts they are liable, whether the resulting injury be caused by an inundation in consequence of the lack or insufficiency of such openings, or by the diversion of the stream from its former natural channel. Bellinger v. N. Y. Cent. R. Co., 23 N. Y. 42; Conhocton Stone Co. v. Buff., N. Y. & E. R. Co., 51 N. Y. 573; Johnson v. Atlantic & St. Louis R. Co., 35 N. H. 569; Spencer v. Hartford, P. & F. R., Co., 10 R. I. 14; Houston & G. N. R. R. Co., 50 Tex. 330; Southside R. R. Co. v. Daniel, 20 Gratt. 344; Hatch v. Vt. Cent. R. R. Co., 25 Vt. 49; Eaton v. Boston, C. & M. R. Co., 51 N. H. 504; Miss. Cent. R. Co. v. Mason, 51 Miss. 234.

The decision in the case of Mills v. G. & C. R. R. Co., reported supra, p. 55, is not in conflict with the principle above laid down. The injury in that case was caused not by the breakage of the defendant company's culvert, but by the act of the company in restoring to its natural channel the waters of a rivulet usually passing through said culvert, but which had been dammed up and accumulated by such breakage. This of course the company had a right to do provided it exercised sufficient care. Whether it had exercised such care was very properly left to the jury. If it had not, its liability for the injury wasundoubted. The culverts or openings, however, which railroad companies are bound to construct, need be only of sufficient capacity to pass the waters ordinarily flowing down the stream. There is no obligation to make provision for extraordinary and unprecedented floods. Kansas Pacific R. R. v. Lundin, 3 Col. 94; Nitrophosphate & O. C. M. Co. v. London & St. K. Docks Co., L. R., 9 Ch. Div. 503; Countess of Rother v. Kirkaldy Water Works Comms., 6 Cas. Ct. Sess. 974; Balt. & Ohio R. R. Co. v. Independent School District, 9 Weekly Notes, 568 (Phila.); Pitts., Ft. W. & C. R. R. Co. v. Gilleland, 56 Pa. St. 445.

With regard to surface waters, the law is much more unsettled. If it flows in a natural, well-established channel, it is conceived that the law applicable to it is identical with that of water-courses. Kauffman v. Griesemer, 26 Pa. St. 407; Martin v. Riddle, ibid. 415; Earl v. De Hart, 1 Beas. 280.

If, however, it does not run in such a channel, a very different rule obtains. The weight of authority is to the effect that there exists no natural servitude in favor of the owner of the superior or higher ground or fields, as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower estate, may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off, on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. Such is the law in

Maine.—Bangor v. Lansel, 51 Me. 521; Greeley v. Maine Central R. Co., 53 Me. 200; Momson v. Bucksport & B. R. Co., 67 Me. 353; Murphy v. Kelley, 68 Me. 521.

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New Hampshire.—Sweet v. Clutts, 50 N. H. 439.

Vermont.—Davis v. Fuller, 12 Vt. 178; Beard v. Murphy, 37 Vt. 104; Chatfield v. Wilson, 28 Vt. 49.

Massachusetts.—Luther v. Winnisommet, 9 Cush. 171; Parke v. Newburyport, 10 Gray, 28; Ashley v. Wolcott, 11 Cush. 192; Gannons v. Hardagon, 10 Allen, 106; Curtis v. Eastern R. R. Co., 14 Allen, 55; Hawkesworth v. Thompson, 98 Mass. 77; Bates v. South, 100 Mass. 181; Emery v. Lowell, 104 Mass. 16; Macomber v. Godfrey, 108 Mass. 219; Dickenson v. Worcester, 7 Allen, 19; Flagg v. Worcester, 13 Gray, 601; Turner v. Inhabitants, etc., 13 Allen, 291.

Rhode Island.—Buffam v. Harris, 5 R. I. 253; Wakefield v. Newell, 12 R. I. 75.

Connecticut.—Wadsworth v. Tillitson, 15 Conn. 366; Gillett v. Johnson, 30 Conn. 180; Adams v. Walker, 34 Conn. 466.

New York.—Goodale v. Tuttle, 29 N. Y. 459; Curtis v. Ayrault, 47 N. Y. 73; Pixley v. Clark, 35 N. Y. 532; Cott v. Lewiston, 36 N. Y. 217; Brown v. Bowen, 30 N. Y. 538; Woffle v. N. Y. C. R. R., 58 Barb. 413; Ellis v. Duncan, 21 Barb. 230; Woffle v. Porter, 61 Barb. 130; Gardner v. Newburg, 2 John. Chy. 162; Wagner v. L. I. R. R. Co., 2 Hun, 633; Conhocton Stone R. Co. v. B. & N. Y. & E. R. Co., 51 N. Y. 573; Trustees v. Youmans, 50 Barb. 316; Bellinger v. N. Y. Cent. R. R. Co., 23 N. Y. 42; Gould v. Booth, 66 N. Y. 62; Sleight v. Kingston, 18 N. Y. Sup. Ct. 594.

New Jersey.—Bowesby v. Speer, 2 Vroom, 351.

Pennsylvania.—L. & C. Turnpike Co.'s Appeal, 80 Pa. St. 425.

Kansas.—Atcheson, T. & S. F. R. Co. v. Hanmer, 22 Kans. 763.

Indiana.—Taylor v. Fickas, 64 Ind. 168; Schlecter et al. v. Phillipy, 67 Ind. 201; Cairo & Vincennes R. R. Co. v. Stevens, reported supra, p. 58; Same v. Howry, reported supra, p. 58.

Wisconsin.—Pettigrew v. Evansville, 25 Wis. 223; Hoyt et al. v. Hudson, 27 Wis. 656; Fryer v. Wame, 29 Wis. 511; O'Connor v. R. R., reported supra, p. 82. And see Rawston v. Taylor, 33 Eng. L. & Eq. 428; Broadbent v. Ramsbotham, 34 id. 553.

"The right of an owner of land," said Bigelow, C. J., in Gannon v. Hargaddon, 10 Allen, 106, "to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any part of it will cause water which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow."

A similar doctrine was enunciated in an early Indiana case, but it has clearly been overruled by the authorities in that State above cited.

The prior authorities in Missouri do not give support to the doctrine of Shane v. R. R. Co., supra. A careful examination of them will show that it has been uniformly held that an owner of lands may exclude surface water or cause it to run from his own land to his neighbor's without liability for the injury inflicted provided that he exercises due care and diligence. The facts are too meagre in Laumier v. Francis, 23 Mo. 181, to warrant any satisfactory conclusion. But see Meer v. City of Springfield, 55 Mo. 119; Munkers v. Kansas City & St. Jo. R. R. Co., 60 Mo. 334; Hosher v. Same, 60 Mo. 329; McCormick v. Kansas City, St. J. & C. B. R. R. Co., 57 Mo. 433; S. C., 70 Mo. 359. The subsequent case of Munkers v. Kansas City, St. J. & Co. Bluffs R. R. Co., reported supra, p. 79, seems also to hold a similar doctrine, and may perhaps be considered as in a certain degree modifying the rule laid

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down in Shane v. R. R. Co. It is clear that a land owner cannot, by cutting a ditch or other artificial water-course, throw at any one point an excessive amount of surface water falling upon his ground upon that of his neighbor. McCormick v. R. R. Co., supra; Livingston v. McDonald, 21 Iowa, 160; Templeton v. Voshloe, 72 Md. 134; Butler v. Peck, 14 Ohio St. 334; White v. Chapin, 12 Allen, 516; Miller v. Laubach, 47 Pa. St 154; Tillotson v. Smith, 32 N. H. 90; Cairo & Vincennes R. R. Co. v. Stevens, reported supra, p. 58; Same v. Howry, reported supra, p. 62. But he may, of course, turn such waters into the channel of a natural stream. Notwithstanding the principles above laid down it is generally conceded that if the construction of a railroad lessens the value of adjoining property by reason of the detention, diversion, or accumulation of surface water, this is an injury for which the owner of the land is entitled to compensation. Pfleger v. Hastings & Dakota R. R. Co., reported supra, p. 85; Eaton v. Bost., C. & M. R. Co., 51 N. H. 504; Momson v. Bucksport R. R. Co., 67 Me. 353; Walker v. Old Col. & N. R. Co., 103 Mass. 10.

It will be observed that in this note a number of authorities have been mentioned which are not distinctively railroad cases, and that in consequence the propositions of law have been many of them framed without special reference to railroad litigation. The nature of the subject-matter rendered this a necessity; and it is hoped that the direct bearing of the various authorities cited on railroad law and their manifest importance will constitute sufficient excuse for their insertion.

As against this doctrine there are, however, several authorities, of which the case of Shane v. Kansas City, St. Joseph & Council Bluffs R. R. Co., reported above, page 64, must be ranked as a very important one.

The doctrine of these cases seems to be that the owner of land is not at liberty, by erecting embankments or otherwise improving his land, to throw surface water upon his neighbor's lot, or to exclude such water from entering his own. Ogburn v. O'Connor, 46 Cal. 346; Hooper v. Wilkinson, 45 La. Ann. 497; Miner v. Wright, 16 La. Ann. 151; Tootle v. Clifton, 22 Ohio St. 247; Hurdman v. N. E. R. R. Co., L. R., 3 C. P. Div. 168; Overton v. Sawyer, 1 Jones (Law), 308; Porter v. Durham, 74 N. C. 769. But see Raleigh and Augusta Air Line R. R. Co. v. Wicker, 74 N. C. 220. This is clearly the law in Illinois. Graham v. Madison Co. R. Co., 49 Ill. 484; Gormley v. Sandford, 52 Ill. 160; Toledo, W. & W. R. Co. v. Momson, 71 Ill. 416; St. L., V. & T. H. R. Co. v. Capps, 72 Ill. 188; Jacksonville, N. W. & S. E. R. R. Co. v. Cox, 91 Ill. 500. "In our judgment," said Lawrence, J., in the case of Gormley v. Sandford, supra, "the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water-course fed by remote springs applies with equal force to the destruction of a natural channel through which the surface waters derived from the rain or snow falling on such field are wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above or has fallen upon remote hills and comes thence in a running stream upon the surface, or rises in a spring in the upper fields and flows upon the lower."

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RAILWAY COMPANY
v.
RENWICK.

(102 *U. S. Reports*, 180.)

The second section of the act of the General Assembly of Iowa, entitled "An Act in relation to riparian owners on the Mississippi and Missouri Rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at its outer end beyond low-water mark erected, without the direction or consent of the Secretary of War, a stone pier or crib, this court affirms the judgment of the Supreme Court of that State, declaring that under that section a railway company cannot construct its road over the embankment between high and low-water mark, unless the damages to such owner shall first be ascertained and paid.

MOTION to dismiss a writ of error to the Supreme Court of the State of Iowa, coupled with a motion under Rule 6 to affirm the judgment.

This was a proceeding, under the statute of Iowa, by the Davenport and North-western Ry. Co. for the assessment of damages sustained by its appropriating lands for the construction of its road. Among others is a strip situate in the city of Davenport between high and low-water mark on the Mississippi River. It fronts certain lots, on which were erected a steam saw-mill, a planing-mill, and other houses. Renwick and others were in possession of the lots, and they or those under whom they claimed had made an embankment extending therefrom into the river, and erected at the end of it a stone pier, without having obtained the consent or direction of the Secretary of War. A boom was thus formed for holding logs in front of and convenient to the mill. The line of the railroad passes over this embankment between high and low-water mark.

The railway company was authorized by law to construct its road, and the city of Davenport gave its consent to laying the tracks within its limits.

A judgment, rendered against the company by the Scott Circuit Court for the damages aforesaid, was affirmed by the Supreme Court. This writ of error was then sued out.

Sect. 5254 of the Revised Statutes of the United States provides:

"The owners of saw-mills on the Mississippi River are authorized and empowered, under the direction of the Secretary of War, to construct piers or cribs in front of their mill property on the banks of the river for the protection of their mills and rafts against damage by floods and ice: Provided, however, that the piers or cribs

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so constructed do not interfere with or obstruct the navigation of the river, and in case any pier or crib constructed under authority of this section shall at any time, and for any cause, be found to obstruct the navigation of the river, the government expressly reserves the right to remove or direct the removal of it, at the cost and expense of the owners thereof."

An act of the General Assembly of Iowa, approved March 18, 1874 (Public Laws of Iowa, 1874, p. 28), is as follows:

"An Act in relation to Riparian Owners on the Mississippi and Missouri Rivers.

"SECT. 1. Be it enacted by the General Assembly of the State of Iowa, that all owners and lessees of lands or lots situate upon the Iowa banks of the Mississippi and Missouri Rivers, upon which property there is now, or may hereafter be, carried on any business which is in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, are hereby authorized to construct and maintain, in front of their said property, piers, cribs, booms, and other proper and convenient erections and devices for the use of their respective pursuits and the protection and harbor of rafts, logs, floats, and other water-crafts: Provided, that the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

"SECT. 2. It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lot or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to such owners occasioned thereby shall be first ascertained and compensated in the manner provided by chap. 4, title 10, of the code."

The company claimed in the courts below that the title to the soil between high and low-water mark being vested in the State, a riparian owner is not entitled to damages by reason of the company's obstructing his access to the Mississippi River by their railroad in front of his premises, and that Congress, in the exercise of its exclusive jurisdiction over the navigable waters of the United States, having prescribed certain conditions on which the owners of saw-mills on the Mississippi River may erect piers or cribs in front of their property, the above act of the General Assembly of Iowa is void.

Mr. James T. Lane and Mr. John N. Rogers in support of the motions.

Mr. James Grant, contra.

Mr. CHIEF JUSTICE WAITE delivered the opinion of the court.

Although the Supreme Court of Iowa decided that Congress, under the power to regulate commerce, had jurisdiction over the Mississippi River, and having exercised that power in the way speci-

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fied in sect. 5254, Rev. Stat., all State legislation in conflict therewith was void, still the question remains, whether, if a riparian proprietor improves his property with a view to its use in connection with the river, without complying with this act of Congress, a railroad company, under the power of eminent domain granted by the State, can appropriate his improvements to its own use without his consent and without making him compensation. This, we think, is a federal question giving us jurisdiction, but it is a question on which we do not care to hear argument. The controversy is not between the public and the riparian owner as to his right to keep up his improvements. The public does not complain, but the railroad company wants the improvements. In the hands of the company they will be just as much a nuisance, so far as the public is concerned, as they can be if kept up by the owner. As between these two parties the improvements are the property of the riparian proprietor, and if the company wants them for its own use it must make compensation. So the court below has decided, and to our minds its decision was clearly right. While in Iowa it has been held that the State owns the lands lying along the river between high and low-water mark, care was taken in the act of March 18, 1874, to provide that it should not be lawful for any person or corporation to construct or operate any railroad or other obstruction between the shore and the river without compensation to the shore owners. The second section of the act is good, even though the first may conflict with what Congress had before done.

The motion to dismiss is denied, but that to affirm granted.

Judgment affirmed.

For a somewhat fuller report of the above case see Renwick v. Railway Co., 49 Iowa, 664, in which the opinion of the Supreme Court of the State of Iowa is set out at full length.

The question raised in this case is not of itself of any great importance, turning as it does wholly upon statutory provisions. A reference, however, to the decisions of the various courts in this country in analogous cases where no special statutes have been passed may prove, it is hoped, of interest.

The general rule in this country is that the owner of lands bordering upon a navigable river has an absolute right as far as high-water mark, and between that point and low-water mark has a qualified right, by virtue of which he is entitled to build piers, wharves, or storehouses, provided that he does not thereby interfere with the navigability of the stream.

Bainbridge v. Sherlock, 29 Ind. 364; Sherlock v. Bainbridge, 41 Ind. 35; Stinson v. Butler, 4 Blackf. 285; Diedrich v. R. R. Co., 47 Wis. 662; Flanagan v. Phila., 42 Pa. St. 229; McKeen v. Delaware Div., 49 Pa. St. 440; Zug v. Comms., 70 Pa. St. 138; Sough v. Bell, 2 Zab. 231; Clement v. Burns, 43 N. H. 609; O'Fallon v. Daggett, 4 Mo. 343; Balt. & Ohio R. R. Co. v. Chase, 43 Md. 23; Rice v. Ruddiman, 10 Mich. 125; R. R. Co. v. Schurmier, 7 Wall. 272; Gates v. Milwaukee, 10 Wall. 497; East Haven v. Hemingway, 7 Conn. 186.

It is, however, also generally recognized that the State has certain rights in the soil lying between high and low-water mark. What those rights are and how far they may be exercised to the prejudice of the riparian owner is the topic of this note.

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According to one line of decisions the right of the State to build upon or occupy this soil, or to grant that right to another without liability to make compensation to the riparian owner, is undoubted. "It must now be accepted," said the court in State v. Mayor of Jersey City, Dutch. 525, "as the established law in New Jersey that the right of the owner of lands bordering on a navigable river extends only to the actual high-water mark, and that all below that mark belongs to the State. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under water. It may be granted by the State to a stranger at any time before it is actually reclaimed and annexed to the upland." And see Stewart v. Fitch et al., 2 Vroom, 118; Stevens v. Patterson and Newark Ry. Co., 34 N. J. L. 532; Att'y Gen'l v. Hudson Tunnel Co., 12 C. E. Green, 176. So in Vermont it was held that it was competent for the State to grant to a railway company the right to fill in the space between high and low-water mark and erect a station and tracks thereon without compensating the riparian proprietor in front of whose lot the artificial land was made. Austin v. Rutland R. R. Co., 45 Vt. 215.

Such is also the law in New York and Iowa. See also City v. Scott, 81 Pa. St. 80.

There are, however, certain benefits accruing to a riparian owner by reason of his proximity to the stream of which he is of course deprived by the construction of a railroad or other public improvement upon the soil lying between high and low-water mark; and the question has been raised whether this is not his property, of which he cannot be deprived without due compensation being made.

In New Jersey this question is unsettled (Keyport Steamboat Co. v. Trans. Co., 3 C. E. Greene, 511). But in Iowa it is definitely settled in the negative. McManus v. Carmichael, 3 Iowa, 1; Haight v. Keokuk, 4 Iowa, 199; Tamler v. Dubuque, Bell. and Miss. R. R. Co., 32 Iowa, 196. In the last named case the court said: "By the rules of the common law the owner of lands along the shore of a navigable river is entitled to no right either in its shores or waters as an incident of his ownership except the contingent ones for alluvion and dereliction. Hence he is not entitled to damages for an improvement made along the banks of such river by the authority of the State, the effect of which is to deprive him of one access to the stream."

And as to land in Iowa this decision has been followed by the Supreme Court of the United States. Barney v. Keokuk, 94 U. S. 324. The cases in New York are to the same effect. Radcliffe's Exr's v. Mayor of Brooklyn, 4 Comst. 195; Lansing v. Smith, 8 Cow. 146; S. C., 4 Wend. 9; Gould v. Hudson River R. R. Co., 6 N. Y. 522.

But in other States a very different doctrine obtains whereby the rights of riparian proprietors are much more guarded. The following is the language of the Supreme Court of the United States on this point with relation to lands in Wisconsin.

Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public. This riparian right is property and is valuable, and though it must be engaged in due subjection to the rights of the public it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good upon due compensation." Yates v. Milwaukee, 10 Wall. 497. This is the well settled law of Wisconsin.

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Chapman v. Oshkosh and M. R. Co., 33 Wis. 629; Delaplaine v. Chicago and N. R. Co., 42 Wis. 214; Diedrich v. N. W. Union R. R. Co., 42 Wis. 248; S. C., 47 Wis. 662. Also the law of Minnesota. Brisbine v. St. Paul and Sioux City Ry. Co., 23 Minn. 114. Maryland. Balt. and Ohio R. R. Co. v. Chase, 43 Md. 23. And Virginia. Railway Co. v. Faunce, 31 Gratt. 761. See also Dutton v. Strong, 1 Black, 25; R. R. Co. v. Schurmier, 7 Wall. 272; Bourman's Devisees v. Wathen, 2 McL. 376; Avery v. Fox, 1 Abb. U. S. 246.

In Pennsylvania the law seems to be to the same effect.

In Lehigh Valley R. R. Co. v. Trone, 28 Pa. St. 206, where a spring of water on the land of a riparian owner, situate below high-water mark, was cut off or injured by the construction of a railroad over his land, it was held that he was entitled to compensation in damages for the injury thereby sustained. See, however, City v. Scott, 81 Pa. St. 80.

The law in England seems also to be that the riparian owner is entitled to compensation. See Duke of Buccleugh v. Met. B'd, L. R., 5 H. L. 418; Lyon v. Fishmonger's Co., L. R., 1 App. Cas. 662; Bell v. Quebec, L. R., 5 App. Cas. 84; Regina v. Rynd, 16 Ir. C. L. 29.

The Chicago and Alton R. R. Co.

v.

The People, ex rel. Joseph Dennison, Collector, etc.

(98 *Illinois Reports*, 351. *March* 21, 1881.)

Under section 1, art. 9, of the Constitution, an assessment for taxation must be made by the person or persons to be elected or appointed in the manner the General Assembly shall direct, and not otherwise. Therefore, an assessment made by a person or persons not authorized by law is void, and no judgment can be rendered for the taxes levied on such assessment.

Under the Revenue law, the exclusive power to assess railroad track and rolling stock of railway companies is conferred upon the State Board of Equalization, and therefore an assessment of property used as railroad track, by the local township assessor, is void.

Land held and in actual use by a railroad company for side-tracks, switches and turnouts must be regarded, within the meaning of the Revenue law, as a part of the right of way of the company notwithstanding it may have machine-shops, depots, round-houses, and other superstructures thereon, necessary for the successful use of the road.

In this case two lots of a railway company contained about 32 acres after deducting a strip 100 feet wide running through them occupied as the main track. The 32 acres were covered by tracks used all the time for the purpose of running cars and engines over them, and for switching cars, making up trains, loading and unloading cars, and for various other purposes in the transaction of the company's business. It was also used for car-shops, machine-shops, blacksmith-shops, foundry, round-houses, freight-depot, stock-yards, paint-shops, etc.: *Held*, that the whole of the lots constituted a part of the company's right of way, and its railroad track, and as such could not legally be assessed by the local township assessors. But land cannot be regarded as right of way merely because one or even two side-tracks may be constructed upon it. The land must be, in fact, appropriated for the purpose of the right of way.

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WRIT of error to the County Court of McLean county; the Hon. REUBEN M. BENJAMIN, Judge, presiding.

Messrs. Williams, Burr and Capen, for the plaintiff in error:

1. Property can only be assessed by some competent person or number of persons designated by law to perform that duty, and any attempted assessment by any one else is null and void. Const. 1870, art. 4, sec. 1; Bureau Co. *v.* C., B. & Q. R. R. Co., 44 Ill. 229; Cooley on Tax. 184.

2. A double assessment of the same property is void. Const. 1870, art. 9, sec. 1; People *v.* Bradley, 39 Ill. 130; C. & N. W. R. R. Co. *v.* Miller, 72 id. 144.

3. All the property in controversy is denominated in the statute "railroad track." Secs. 41, 42 and 43, Revenue act; C., B. & Q. R. R. Co. *v.* Wilson, 17 Ill. 123; Low *v.* G. & C. U. R. R. Co., 18 id. 324; C. & N. W. R. R. Co. *v.* Miller, 72 id. 144; C., R. I. & P. R. R. Co. *v.* People, 4 Bradw. 468.

4. The property denominated "railroad track" by the statute is only assessable by the State Board of Equalization. Secs. 48, 50, 109, Revenue act, Rev. Stat. 1874.

5. The State Board of Equalization did, in fact, assess said lots 1 and 2 as railroad track, and such assessments have been paid, as shown by the evidence.

6. The assessment of the property is void for uncertainty, as it cannot be located. Shackleford *v.* Bailey, 35 Ill. 387; Laflin *v.* Herrington, 16 id. 301; Hughes *v.* Streeter, 24 id. 647.

7. No judgment can be rendered against property for taxes unless the description is such that it can be located. Cooley on Tax. 282, and cases cited; Blackwell on Tax. Titles, 124; Fitch *v.* Pinckard, 4 Scam. 69; Fowler *v.* People, 93 Ill. 116.

8. If land is listed in one class and assessed in another, the assessment is void. Tibbetts *v.* Job, 11 Ill. 453; Graves *v.* Bruen, id. 431.

9. A decree of court of competent jurisdiction is binding on the parties till reversed.

Mr. C. Beckwith, also for the plaintiff in error:

1. The property assessed by the local assessors was held by the railroad company for its right of way, and was therefore embraced in the class of property denominated by the Revenue law as "railroad track," and not assessable by town assessors. Rev. law of 1872, secs. 40–50.

2. As to the right of the company to acquire lands for right of way, and hold the same, except on a direct proceeding on the part of the State for an abuse of its powers, see Sheewalter *v.* Pirnier, 55 Mo. 258; Natonia Water and Mining Co. *v.* Clarkin, 14 Cal. 544; DeCamp *v.* Dobbins, 29 N. J. Eq. 36; Speare *v.* Crawford, 14 Wend. 20; C., M. & S. Co. *v.* V., H. & W. Co., 1 Sawyer,

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470; Claremont Bridge Co. *v.* Royce, 42 Vt. 730; Cowell *v.* Springs Co., 11 Otto (101 U. S.), 55.

Mr. Robert B. Porter and Mr. J. W. Fifer for the defendants in error:

1. The description is sufficient. It excepts the strip used as "railroad track." The exception in a deed need not be as exactly described as the land conveyed. Lake Shore and Mich. South. R. R. Co. *v.* P., Ft. W. & C. R. R. Co., 71 Ill. 38; Williams *v.* Warren, 21 id. 541; Bowman *v.* Wettig, 39 id. 416.

2. The land in controversy is "real estate other than 'railroad track,'" and only assessable by the local assessors. Rev. law, secs. 46, 47, 49, 109; C., B. & Q. R. R. Co. *v.* Paddock, 75 Ill. 616.

3. The court below found this to be "real estate other than 'railroad track;'" and, that being a finding of fact, this court will not disturb it unless it is manifestly against the great weight of evidence. This proposition we regard so well settled by the decisions of this court as to need no citation of authorities.

4. The real question at issue, the question that is of vital interest, both to the public and the plaintiff in error, is, what is the property in controversy? "Railroad track," or "real estate other than 'railroad track?'" If the first, then manifestly the State Board is the only proper assessor. If the second, then the local assessors are the only proper legal authorities to make the assessment. See secs. 46–48, 50, 109, Revenue law; Porter *v.* Railroad Co., 76 Ill. 561; Life Ins. Co. *v.* Pollock, 75 id. 292; C., B. & Q. R. R. Co. *v.* Cole, id. 591; Pacific Hotel *v.* Lieb, 83 id. 602; State Railroad Tax Cases, 92 U. S. (2 Otto) 575.

5. These thirty-two acres have been found by the court below to be "real estate other than 'railroad track.'" The opportunities of that court for determining were good; and an inspection of the map of the plaintiff in error will demonstrate to this court that there is no reason for disturbing that finding. Turnouts are only means of access to the buildings, and would not be used if it were more economical to transport material by other means. The value of the side-tracks and turnouts was not included in these assessments.

That the finding should not be disturbed unless manifestly against the weight of evidence needs only to be suggested to the court; but we risk citing a few of the many cases in support of the proposition. Chicago City Railway Co. *v.* Young, 62 Ill. 238; Bourne *v.* Stout, id. 261; American Express Co. *v.* Bruce, 50 id. 201; Malburn *v.* Schreiner, 49 id. 69; Powell *v.* Feeley, id. 143; Lalor *v.* Scanlan, id. 152; Baker *v.* Robinson, id. 299.

CRAIG, J.—This was an application by the collector of McLean county for judgment against certain lands, for taxes, described as blocks one and two of the Chicago and Alton R. R. Co's. survey of its grounds in the city of Bloomington, except a strip of land

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one hundred feet in width extending through blocks one and two, on which strip the company's main line is located. The taxes are claimed to be due for the years 1873 to 1879 inclusive. Lot one lies in Bloomington township and lot two in Normal Township. Both tracts, however, are within the city of Bloomington. The taxes for which application for judgment was made were assessed by the township assessors of the respective townships.

The principal objection urged by the Chicago and Alton R. R. Co. to the application for judgment in the county court, and the only one which we shall consider, is, that the property was land held by the railroad company for its right of way, and embraced in the class of property denominated by the Revenue law as "railroad track," and, therefore, not assessable by local assessors. If the property in question belongs to that class known in the Revenue law as "railroad track," then it was assessable by the State Board of Equalization, and the township assessors had no power to make the assessment, and the judgment based on such assessment is erroneous. If, on the other hand, the property is real estate belonging to the railroad company, other than railroad track, then the assessment by the township assessors was valid and the judgment rendered regular.

Under sec. 1, art. 9, of the constitution, an assessment must be made by the person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise. It is therefore apparent that unless the assessment here involved was made by the person or persons authorized by law, it is void.

Section 41 of the Revenue law, Rev. Stat. 1874, p. 865, requires that all railroad corporations owning, operating or constructing a railroad in this State, "shall, in the month of May of the year 1873, and at the same time in each year thereafter, when required, make out and file with the county clerks of the respective counties in which the railroad may be located, a statement or schedule showing the property held for right of way, and the length of the main and all side and second tracks and turnouts in such county, and in each city, town and village in the county, through or into which the road may run, and describing each tract of land, other than a city, town or village lot, through which the road may run, in accordance with the United States surveys, giving the width and length of the strip of land held in each tract, and the number of acres thereof. They shall also state the value of improvements and stations located on the right of way."

Section 48 of the same statute requires the railroad company at the same time to return a schedule to the Auditor of Public Accounts, of the property denominated "railroad track," giving the length of the main and side or second tracks and turnouts, etc. Also showing the rolling stock, etc.

Section 50 requires the Auditor annually, on the meeting of the

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State Board of Equalization, to lay before the board the statements and schedule required to be returned to him, and makes it the duty of the board to assess the property named in the schedule.

It will be observed, that by the terms of section 41 the railroad company is required to return to the county clerk and Auditor a statement or schedule showing the property held for right of way. This is followed by section 42, which undertakes to determine what property is known by the term railroad track, as follows:

"§ 42. Such right of way, including the superstructures of main, side or second track and turnouts, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line in entering the county, city, town or village, and extending to the point where such track crosses the boundary line leaving such county, city, town or village."

What was intended by the enactment of this section of the statute by the use of the words here employed, "such right of way"? Were these words intended to mean merely the strip of land a certain number of feet wide, upon which the railroad company had constructed its main track, or did the framers of the section intend to embrace not only the main line of the road but all side-tracks, turnouts and switches which are connected with the main track and which are in actual use by the railroad company as a common carrier?

We can see no reason why the term "right of way" should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side-track, a switch, or a turnout is built and in actual use by the company in the business for which it was organized, for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other, and hence the necessity of turnouts, switches and side-tracks. In the loading of cars, transfer of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side-tracks, switches and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are, therefore, of the opinion that the land held and in actual use by a railroad company for side-tracks, switches and turnouts, must be regarded, within the meaning of the Revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed; and upon

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what principle the land upon which the main track is laid can be held to be right of way, and the land over which a side-track, switch, or a turnout passes can be termed something else, we are at a loss to understand.

Again, if the construction contended for by defendants in error be the correct one, the land upon which the side-tracks and turnouts are constructed will have to be assessed by one set of assessors and the superstructures thereon by another board of assessors. Section 42, in express terms, requires the superstructures of the second track and turnouts, and the station and improvements on right of way, shall be denominated railroad track, and railroad track can only be assessed by the State Board of Equalization. It is unreasonable to believe that the legislature ever contemplated that land upon which side-tracks, turnouts and switches are constructed should be assessed by township assessors, and the improvements thereon by another and distinct board of assessors. Such a practice would create confusion, and a just and proper assessment could rarely, if ever, be made.

Section 43 seems to have an important bearing on the question under consideration. It provides:

"The value of the 'railroad track' shall be listed and taxed in the several counties, towns, villages, districts and cities, in the proportion that the length of the main track in such county, town, village, district or city bears to the whole length of the road in this State, except the value of the side or second track, and all turnouts, and all station-houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county, town, village, district or city in which the same are located."

If railroad track, which, under the Revenue law, is the right of way, did not embrace land occupied by side or second track and turnouts, why provide for the exception contained in this section? The very fact that the exception was inserted would seem to indicate that side or second tracks and turnouts were a part and parcel of what is denominated in the Revenue law as railroad track.

It will now be necessary to examine the evidence and ascertain whether lots one and two are a part of the right of way in use by the railroad company. These two lots, as appears from the evidence introduced on the application for judgment, contain about thirty-two acres after deducting a strip of land one hundred feet wide running through the two lots, occupied by the main track. The thirty-two acres are covered by tracks used all the time for the purpose of running cars and engines over them, and for switching cars, making up trains, loading and unloading cars, and for various other purposes in the transaction of the company's business. The ground is also used for car-shops, machine-shops, blacksmith-shops, foundry, round-house, freight-depot, stock-yards, paint-shops, etc. Trains run over the whole of it, from one length to the other, every

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day, except Sunday, and some on that day. These tracks were constructed for the purpose of operating the company's road under its charter as a common carrier of persons and property. The company's principal shops are here for building and repairing cars, machinery and engines. They use the tracks also for switching in making up trains, putting in cars for temporary use, and for the general business of the road. One witness, on his cross-examination, said: "We need all the ground and have needed it during the past seven years, for the purposes of transportation, movement of trains, proper facilities of manufacturing and repairing its rolling stock, affording shelter for its engines and tenders," etc.

From the evidence, it is manifest that the railroad company has constructed tracks around the entire thirty-two acres of land; that it is covered with side-tracks, switches and turnouts connected with its main track, and in constant use by the railroad company in the prosecution of its legitimate business as a common carrier, for which it was organized under a charter granted by the State. Buildings have been erected on this land by the company, termed machine-shops, car-shops, round-houses, etc., where repairs are made for the company's rolling stock; but this use does not change the character of the manner in which the land was held. It is still held as right of way, notwithstanding such buildings.

These shops are, doubtless, necessary to insure a successful operation of the railroad; but whether they are or not is not important, as the Revenue law anticipated that such structures would be erected on the company's right of way, and made express provision, when that was done, that they should form a part of the right of way and be taxed as such. This is apparent from section 42, which declares that the right of way, including superstructures of main, side or second track, and turnouts, and the station and improvements of the railroad company on such right of way, shall be real estate for the purpose of taxation, and denominated "railroad track." The fact, then, that the company has erected and is using shops on this land for the purpose of right of way, does not, in the least, militate against the view that the land is held for right of way.

Inasmuch as the exclusive power to assess railroad track and rolling stock has been conferred on the State Board of Equalization, there seems to be no reason whatever why the power of assessment of property situated as is the property in controversy should be conferred on the township assessors. The State Board has many facilities for making a correct and just assessment which the township assessor cannot have. Under section 109 it has the power to examine persons and papers where it may be necessary to reach a correct result. The locality where the property is situated gains nothing by an assessment made by the local assessor. Whether the assessment is made by the township assessor, or by the State Board under section 43 of the Revenue act, the value of side-track

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and turnouts, station-houses, depots, machine-shops, or other buildings belonging to the road, shall be taxed in the county, town, village, district or city in which the same are located, thus giving the locality where the property is situated the benefit of the taxes to be collected from such property, whether it is assessed by the local assessors or by the State Board of Equalization.

It is urged, however, that if the construction claimed by plaintiff in error is placed on the statute, then in every case where a railroad company owns a coal-mine, or stock-yards, and constructs a side-track to either, such tract of land, although it may contain many acres, cannot be assessed by the township assessors, but must be regarded as right of way. We do not understand that such a result will follow. A tract of land cannot be regarded right of way merely because one or even two or more side-tracks may be constructed upon or over it, but the land must be appropriated, as is the land in question, to that purpose. The land here is covered with numerous tracks, and is all substantially appropriated for the purpose of right of way, and when such is the case it forms a part of and becomes right of way. If we are correct in this view it follows that the assessment by the local assessors was void, the judgment of the county court was erroneous, and it will be reversed.

Judgment reversed.

WALKER and SCHOLFIELD, JJ.: We concur in reversing the judgment, but not in all that is said in defining what is here right of way.

THE OHIO AND MISSISSIPPI R. R. CO.

v.

HERMAN G. WEBER.

(96 *Illinois Reports*, 443, *May* 14—*Rehearing denied Nov.*, 1880.)

When a corporation is formed under our laws by the consolidation of other corporations, one of which was incorporated under the laws of this State, and the others in other States, the new, or consolidated company, is to be considered as "incorporated under the laws of this State," within the meaning of the last clause of the first section of the Revenue act of March 30, 1872, and the capital stock of such corporation in this State is subject to taxation here.

The State Board of Equalization found the value of the capital stock and rolling stock of a railroad corporation, operating its road and franchise in this and other States by a continuous line, by taking the value of the entire capital stock, and all the rolling stock of the corporation everywhere, and set apart so much of the entire value of each, for taxation in this State, as the proportion of the length of its main line, in this State, bore to the length of the entire line of the road owned and operated by it. It did not appear whether this was done from their own knowledge, or from information from

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other sources, and there was nothing to show fraud or illegality in their action: *Held*, in the absence of proof to the contrary, that the mode adopted by them, and the conclusion they reached, was fair and reasonable, and that this was not an assessment of any part of its property in the other States.

Under the statute, the property of railroad companies is thus classified and defined for the purposes of taxation: The "capital stock" means all the property and rights of the corporation, of every kind and nature, wherever located. The "railroad track" embraces property held for right of way, including superstructures thereon, and this is declared to be real estate. "Rolling stock" embraces the movable property of the corporation, which is declared personal property, and this is such property as, in its ordinary use, is taken from one part of the line to another, as cars, locomotives and their attachments, and usual accompaniments. "Personal property, other than rolling stock," embraces tools, materials for repairs, and all other property which, in its ordinary use, is not taken from one part of the line to another, and the local property, the railroad track, and rolling stock, constitute the tangible property of the corporation, and all other kinds of property, embracing the franchise and such other values as are inaccessible to the local assessors, the intangible property, and all those combined constitute the capital stock.

The object of the legislature, in regard to the assessment of railroad corporations, was and is to subject each railroad company in the State to taxation, in proportion to the value of all its property liable to be taxed, whether tangible or intangible, real, personal or mixed, embracing, among other kinds of property, the franchises granted or exercised within this State.

A rule adopted by the State Board of Equalization, for the assessment of the capital stock of corporations, that the value of all shares of the stock, and the value of all the debts, excluding those for current expenses, should be added together to ascertain the fair cash value of the capital stock, or entire property, including the franchises, and that from this sum should be deducted the amount of the value of all tangible property, and that the remainder should be taken as the fair cash value, to be assessed for taxation, was sustained on an application to enjoin the collection of a tax levied upon such sum, when equalized, by the board, with other property.

While it is true that the statute must be understood as applying only to such property of railroad corporations, operating in this and other States, on the same line of road, as is subject to taxation in this State, the fact that the value of the whole property, both in and without the State, is used in the computation by which to arrive at the value of that part thereof to be assessed here for taxation, will not render the assessment or the taxes levied thereon invalid.

APPEAL from the Circuit Court of Clay county; the Hon. JAMES C. ALLEN, Judge, presiding.

This was a suit instituted by the Ohio and Mississippi Ry. Co., to restrain the collection of the taxes extended on the capital stock of said company, in 1875. This company was organized under the laws of Illinois, and was consolidated with two other corporations of the same name, organized, respectively, under the laws of Indiana and Ohio, to operate a line of railroad from East St. Louis, in Illinois, to Cincinnati, Ohio, with a branch road from North Vernon, Indiana, to Louisville, Kentucky. In January, 1875, the company also became the owner of the Springfield and Illinois Southeastern R. R., extending from Beardstown to Shawneetown, in this State.

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The value of capital stock of the consolidated company was $24,030,000, and the value of its indebtedness (exclusive of that incurred for current expenses) was $13,863,000. The total value of the tangible property of the company was assessed at $1,929,411, and there was also assessed against the company, in Illinois, under the designation "capital stock," the sum of $4,012,173, which was distributed to the several counties, as directed by the statute, and upon which taxes were extended. The length of the Ohio and Mississippi Ry., in Illinois, was 146 miles and 1678 feet; the length of the Springfield and Illinois Southeastern R. R. was 220 miles; and the length of the Ohio and Mississippi Ry., outside of Illinois, was 244½ miles, making a total mileage of a fraction over 610 miles, of which 366 were in Illinois.

The complainant's bill questions the validity of this assessment of capital stock, for the reason, as it alleges, that the Ohio and Mississippi Ry. Co. was not a corporation created under the laws of this State, within the meaning of section 3 of the Revenue law. (Rev. Stat. 1874, p. 858.) It is also claimed that the Board of Equalization arrived at this assessment by apportioning the whole amount of the consolidated stock ($24,030,000), and the whole amount of the consolidated debt ($13,863,000), according to the mileage of the road operated by the company, that is, it divided those respective amounts by 610, and multiplied the quotients by 366, and the amounts of capital stock and debt thus apportioned to Illinois, were then assessed and equalized with the other State assessments, by deducting fifty per cent, and the value fixed at $5,942,244, from which was deducted $1,929,711, as the assessed value of the tangible property of the company, leaving $4,012,533, and by reason of this manner of making the assessment, complainant contends it is void.

Upon the filing of the bill, the court below granted a temporary injunction, but, upon final hearing, entered a decree, dissolving the injunction and dismissing the bill, from which the complainant has prosecuted this appeal to this court.

Mr. Charles A. Beecher and Mr. Garland Pollard, for the appellant.

Mr. James K. Edsall, Attorney-General, for the appellee:

The complainants filed their bill in the Circuit Court of Richland county to enjoin the collection of the taxes assessed upon the capital stock of the Ohio and M. Ry. Co. for the year 1875, upon which a temporary injunction was ordered. Venue was changed to Clay Co. by agreement.

On behalf of the appellees we insist:

I.

The Ohio and Mississippi Ry. Co., so far as it owns property and exercises franchises in Illinois, is a corporation "created under the

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laws of this State" within the meaning of the Revenue law and subject to assessment upon such property and franchises under the designation "capital stock."

1. The question first arising is as to the legal effect of the consolidation upon the Illinois corporation. It is held by the Supreme Court of this State that the consolidation of the stock of a railroad corporation created by the laws of another State, with that of one created by the laws of this State, does not constitute the corporations thus consolidating one corporation of both States, or of either, but the corporation of each State continues a corporation of the State of its creation, although the same persons as officers and directors manage and control both corporations as one body. R. and M. R. R. Co. *v.* F. L. and T. Co., 49 Ill. 331–348 and 351.

A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two States, cannot have one and the same legal being in both States. Neither State could confer on it a corporate existence in the other nor add to or diminish the powers to be there exercised. Ohio and Miss. R. R. Co. *v.* Wheeler, 1 Black (U. S.), 286.

So in Muller *v.* Dows, 94 U. S. Rep. (4 Otto) 444, it was held that a corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri under the authority of a statute in each State, is, nevertheless, in Iowa a corporation existing there under the laws of that State alone.

As to all transactions in this State and all franchises conferred by the laws of, or exercised within, and all property used or situated in the State of Illinois, the Ohio and Mississippi Ry. Co. is to be treated as a corporation organized under the laws of Illinois, notwithstanding the supposed consolidation. Ibid.

Such being the case, the corporation, so far as it exists in Illinois, is subject to taxation upon its capital stock, franchises and property situate or used within that State or pertaining to its existence therein, to the same extent that it would have been had no consolidation been attempted.

When the State gave its consent to the consolidation it certainly neither waived nor lost its right to tax the corporation created under, and franchises conferred by, its own laws.

2. The tax assessed under the designation "capital stock" is a tax upon the capital or property and franchises owned and exercised by the corporation taxed. Porter *v.* R., R. I. and St. L. R. R. Co., 76 Ill. 563–567; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 561; State Railroad Tax Cases, 92 U. S. (2 Otto) 602.

It is not a tax upon the shares of stock or debt of the consolidated company, nor of that of the Illinois corporation. Ibid. The right to impose a tax upon the capital stock or property and franchises of the corporation in this State is not affected by the fact that the shares of stock issued to the stockholders and bonds issued

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to the creditors represent the entire property of the consolidated company, a part of which is situate in other States than Illinois. This condition of affairs may render it more difficult to fairly make such assessments, but does not deprive the State Board of the power to assess the capital stock or property and franchises of the corporation in this State. Indianapolis and St. Louis R. R. Co. v. Vance et al. (Sup. Ct. U. S.) 10 Legal News, p. 243.

II.

The assessment of capital stock was based upon the property and franchises of the company in Illinois as ascertained by the State Board.

The answer contains the following: "These defendants, further answering, admit that the Board of Equalization, in assessing the capital stock, including the franchise and tangible property of the complainant pertaining to the portion of its road in the State of Illinois, added the value of such portion of its shares of stock as pertained to its road in the State of Illinois, to the value of such portion of its bonded debt as pertained to its road in Illinois (as ascertained and determined by the said Board of Equalization), and after having equalized such aggregate amount with the assessed value of property generally in the State, by the deduction of 50 per cent, and also deducting therefrom the total assessed value of the tangible property of said company in this State, the said State Board assessed the residue against the said company as the portion of its capital stock, including its franchise, in this State, over and above the assessed value of its tangible property in this State; and the defendants aver that in so assessing the said complainant, said Board of Equalization acted fairly, lawfully, and in pursuance of the laws of the State of Illinois, and the rules adopted by said Board."

The answer denies all charges of fraud contained in the bill, and also contains the usual traverse of all the averments in the bill not expressly admitted. Munson v. Miller, 66 Ill. 380.

This put the complainant upon proof of every material allegation of the bill. Ibid. 382.

There is no proof in the record to show that the State Board based their assessment upon the property and franchises of the consolidated company in other States.

The State Board had no right to do this, and the court will not presume, without clear proof, that they exceeded their jurisdiction in making the assessment. So far as appears, the State Board ascertained, according to their best judgment, the value of the capital stock, including the franchises of the company, which pertained to its road in Illinois, and assessed the same accordingly. It may be that the Board erred in judgment or reasoned incorrectly, and failed to adopt the wisest plan to arrive at a correct valuation; but if such

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was the fact it would constitute no ground for relief in equity so long as they acted upon a subject within their jurisdiction and exercised an honest judgment. "The State Board of Equalization being composed of persons elected to assess and fix the value of such property as has been designated by law, their valuation is conclusive and final, and the courts cannot examine the mode of reasoning or the basis adopted by them to ascertain the value of property." Republic Life Ins. Co. *v.* Pollak, 75 Ill. 292; Porter *v.* R., R. I. and St. L. R. R. Co., 76 Ill. 561; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556; Munson *v.* Miller, 66 Ill. 389.

The deposition of the witness Walton, showing that the shares of stock were owned by non-residents of the State, was immaterial, inasmuch as the shares of stock are not assessed.

The testimony of the witnesses Gurney, Ewing, Kelley, Punnett and Averill upon the question as to the relative cost and value and amount of business transacted upon the portions of the entire line operated by the consolidated company in Illinois and the other States, disclose no ground for interposition of a court of equity. If we concede all that this evidence tends to prove, it might possibly raise an inference that the State Board placed too high a valuation upon the property and franchises in Illinois, and would not impair the validity of the assessment. Ibid.

The proceedings of the State Board for 1875, introduced in evidence (p. 65), simply sustain the averments in the answer that the State Board only assumed to assess against this company such amount of its capital stock as in the judgment of the Board pertained to the portion of its road in Illinois, and show that they did not in fact assess the property and franchises of the consolidated company in other States.

It was the duty of the Board to determine this question upon the best information accessible and such as was satisfactory to their minds. Pacific Hotel Co. *v.* Pollock, 8 Legal News, 396; 85 Ill. 602.

The accuracy of their determination is not subject to review in the courts.

DICKEY, J.—Where a corporation is formed under our laws by consolidation of other corporations (which are merged into the new corporation thus formed), and where one of the constituent companies was incorporated under the laws of this State, the new corporation thus formed is to be considered as one of the "companies incorporated under the laws of this State," within the terms and meaning of the last clause of the first section of the Revenue act of March 30, 1872; and the capital stock (located or used in this State) of such corporation is subject to be assessed and taxed as such. There can be no distinction in principle between the status of such corporation and that of a corporation operating its business

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in two adjoining States, having a charter for such purpose from each of such States, and that has been decided to be the law applicable to the latter class of companies. Quincy Bridge Co. *v.* County of Adams, 88 Ill. 615.

The corporation in the case at bar owns and operates a railroad extending from East St. Louis through Illinois, Indiana, to Cincinnati, in the State of Ohio, with a branch from a point in Indiana extending to Louisville, in the State of Kentucky; and also owns and operates a connecting road lying entirely in the State of Illinois, and extending from Beardstown, on the Illinois River, to Shawneetown, on the Ohio River.

This corporation was formed by the consolidation of a corporation of the same name (created under a statute of this State) with other railroad companies of other States. This consolidation was accomplished by virtue and authority of a statute of this State providing that this might be done. It is not perceived that this corporation thus formed is any the less, in substance and effect, a corporation "created under the laws of this State" than would have been the constituent company of this State in case that corporation, under powers granted by this State, had purchased the lines of railroad outside of this State, by permission of the States in which they lie, and was operating the same. In our view, this consolidated corporation is one corporation, having franchises from several States, and, in its relation to Illinois, must be considered as having a franchise from the State of Illinois, enabling it to transact business in Illinois, and elsewhere by permission of the governing power where it so does.

It is charged by appellants that the assessment of the capital stock of this corporation is not a valid assessment, and was made by the Board of Equalization illegally and fraudulently.

The mode of finding the value of the capital stock to be taxed in Illinois was to take the value of the entire capital stock of this corporation, and adopting that amount thereof which should bear to the value of the entire capital stock the same proportion as the length of that part of the line lying in Illinois bears to the entire length of the whole line of railroad owned and operated by this corporation.

It is also claimed that the mode of ascertaining the value of that part of the "rolling stock" subject to taxation in Illinois was illegal and void. The mode adopted in that regard was to take the value of all the "rolling stock" of this corporation, and set apart, as a proper value of that part thereof to be taxed in Illinois, so much of the value of all the rolling stock as should bear the same proportion to the value of all the rolling stock as the length of that part of the main lines located in the State of Illinois bore to the entire length of the entire lines belonging to this company.

Under our laws, for the purpose of assessment as a basis for tax-

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ation, the property of railroad companies is classified by the statute, and specific names are adopted to designate in a word all the property embraced in each class.

To avoid confusion, it is important to keep in mind the exact meaning of each of these names.

The term "capital stock" means all the property and rights of the corporation of every kind and nature, wherever located.

The term "railroad track" embraces property held for right of way, including superstructures thereon, and this is declared to be "real estate for purposes of taxation."

"Rolling stock" embraces the movable property belonging to the corporation, and is declared personal property, for the purposes of taxation. By movable property is plainly meant such property as in its ordinary use is taken from one part of the line to another, such as cars, locomotives and their attachments and usual accompaniments.

"Personal property other than rolling stock" embraces tools, materials for repairs, and all other property which, in its ordinary use, is not taken from one part of the line to another. This, with lands not being part of the "railroad track," constitutes local property.

The local property—the "railroad track and rolling stock"—constitutes the tangible property of the corporation, and all other kinds of property (embracing the franchise of the corporation and such other values as are inaccessible to the local assessor) belonging to the corporation constitute the intangible property, and all these combined constitute the capital stock.

For purposes of assessment for taxation, each railroad company is required by law to furnish to the county clerk of each county, annually, a statement showing:—

1st. Its "railroad track," giving the length of its main and all side and second tracks and turnouts, in such county, and in each town, village and city in such county, and giving the length of the main track on which the rolling stock is used in the State, and the length of the main track on which it is used elsewhere.

The lands and personal property of railroad companies, other than "railroad track" and rolling stock, found in each county, is assessed by the local assessors as the property of other persons is assessed, and returned to the county clerk.

Each railroad company is also required by law to furnish annually, to the Auditor of the State, a statement embracing—

1st. Its "railroad track," giving the length of the main and side or second tracks and turnouts, and the proportions in each county, and total in the State.

2d. Its "rolling stock," giving the length of the main track in each county, the total in this State, and the entire length of the road; stating the number of ties in track per mile, the weight of

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iron or steel, per yard, used in main and side tracks; what joints or chairs are used in tracks; the ballasting, whether gravel or dirt; the number and quality of buildings and structures on "railroad track;" the length of time iron in track has been used, and the length of time the road has been built.

3d. A schedule showing the amount of capital stock authorized, and the number of shares of stock; the amount of capital stock paid up; the value of the shares of stock, and the total amount of all indebtedness (except current expenses), and the total listed valuation of all its tangible property in this State.

The county clerk is also required to transmit to the Auditor of State an abstract of the assessment of property in his county which (in so far as relates to railroad companies) embraces the tangible property of each railroad company located or found in such county —that is, its "railroad track," lands, lots, and personal property other than "rolling stock," and the value of the lands, lots, and personal property other than "rolling stock," as returned by the local assessors, and the value of the "railroad track" as returned to the clerk by the railroad company.

The State Board of Equalization, under our laws, is furnished with the information contained in the returns thus made by the county clerks of the several counties in this State in which any part of line of any railroad is located, and also with the information contained in the return made by the railroad company to the Auditor.

The board then is required to assess the "railroad track" and "rolling stock" of each railroad company, with power to examine persons and papers.

It is also its duty to equalize the assessment of "local property" of such companies as it equalizes the value of other property assessed in the different counties by the local assessors, and as reported to the Auditor.

It was also the duty of this board to so value the "capital stock" of each corporation as to determine the fair cash value thereof in excess of the assessed value of the tangible property of such company, and to that end to adopt such rules and principles as might seem just and equitable.

The plain object of all this legislation was, and is, to subject each railroad company in this State to taxation in proportion to the value of all of its property subject to taxation in this State, whether tangible or intangible, real, personal, or mixed—embracing, among other kinds of property, the franchises exercised within or granted by this State.

To this end the State Board of Equalization adopted a rule for the assessment of the capital stock of corporations, providing, in substance, that the value of all the shares of the stock, and the value of all the debt (excluding debt for current expenses), be

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added together, to ascertain the fair cash value of the "capital stock," or entire property (including franchise), of the corporation, and from this sum there be deducted the amount of the value of all tangible property of the corporation, and that the remainder, if any, should be taken as the fair cash value of the "capital stock" which the board is required to assess; that being "the fair cash value" of such "capital stock" over and above (in excess of) "the assessed value of the tangible property of such company."

It is insisted this rule is inapplicable to a railroad company whose property is in the condition in which that of this corporation really is.

It is also claimed that the board have assessed in part the value of the franchises of this corporation derived from other States, and also in part the "rolling stock" of this corporation situate in other States, and which has never been used in this State; and also have assessed in part real property of the corporation located in other States, and not subject to taxation here; that this is jurisdictional, and therefore the action of the board is void, and for want of a valid assessment the tax upon the "rolling stock" and capital stock is void.

These positions, we think, are not sustained by the facts in the record.

While the statute, in terms, does not expressly exclude from its operation property which is not within the power of the State to tax, it must be understood as applying only to such property as is subject to taxation by this State; and while the rule does not in terms confine its operation to such property only, it must be so construed.

Nor does the record show that the board attempted to apply its rule to any property of any kind not subject to assessment and taxation in Illinois.

The tangible property of this corporation, subject to taxation here, embraced the local property, real and personal, assessed in the several counties, and such "rolling stock" as was owned by the corporation, and used in Illinois.

It cannot be questioned that this corporation has such a situs in Illinois as to subject it to taxation as a resident.

The local property was assessed by the assessors; that assessment as equalized by the county board, and reported to the Auditor, was again adjusted, and its final value thus fixed by the State Board of Equalization, and constituted one factor in this estimate.

The next duty of the board was to value the "rolling stock" of this corporation, subject to taxation in this State. How was that value to be ascertained? The law says, by the judgment of the board. The return of the railroad company showed in what this part of the rolling stock consisted. From their knowledge of such affairs, or from information from some other source, it seems that

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they believed that such value would bear about the same relation to the value of all the rolling stock of the corporation, as the length of the main tracks in Illinois bears to the length of all the main tracks. What proofs they had to lead them to this conclusion, this record does not fully show. It surely does not show that this judgment was so glaringly wrong as to indicate any fraud or illegality in the action of the board.

They had the suggestion from the legislature on a like question. It is plainly the intention of the Revenue law to subject a fair and proper proportion of the value of movable railroad property to local taxation, along its line; and it is provided by statute that the value of the entire "railroad track" in the State shall be distributed, for local taxation, to each county, "in proportion to the length of the main track in such county;" and in another section, that the value of the "rolling stock" shall also be distributed in the several counties "in the proportion that the length of the main track used in such county" . . . "bears to the whole length of the road." And in the same section it is required that the list of property to be furnished by the corporation to the county clerk, of the "rolling stock," shall set forth the length of the main track used, not only in such county, but also "in the State," and also the number of miles of main track used elsewhere.

It surely cannot be inferred that the State Board of Equalization acted corruptly, merely from the fact that they came to a conclusion (the same with that suggested by the General Assembly), that generally a fair distribution for taxation of the value of rolling stock was in proportion to the mileage of the corporation lying in the district for which the taxes were to be levied.

In the absence of proof to the contrary, the conclusion seems very reasonable. True, it will probably never prove mathematically accurate, but may, for aught that appears, be, as a general rule, a reasonable approximation to accuracy.

Having thus ascertained the value of the tangible property of the corporation, embracing the value of the "railroad track" in Illinois, and the value of the "rolling stock" subject to tax in Illinois, and the value of the local property assessed by the local assessors, it became necessary to ascertain the value of so much of the "capital stock" as the board was required to assess as capital stock.

It must be remembered that capital stock here means all property and rights having value owned by the corporation, wherever located. This was readily ascertained by adding the amount of the value of all the shares of stock owned by its stockholders, to the amount of value of all its fixed indebtedness. Part, only, of all this property, of every kind, belonged in Illinois, and that, only, the board wished to value. In their judgment, they determined that the value of that part of all the property of this corporation

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pertaining to Illinois, as compared with the value of the whole, was in proportion to the length of the main track in Illinois, as compared with the length of all the lines.

Having ascertained, in accordance with their rule, the value of all the property, of every kind, belonging to this corporation, everywhere, and having concluded, by the exercise of their judgment, that the relative value of all the property of this corporation in Illinois (embracing its franchise in Illinois), when compared with the value of its entire property, of every kind, everywhere, would be in proportion with the mileage of the main track in Illinois, as compared with the mileage of all the main track everywhere, its value was accordingly fixed, by computation, on that basis. Having thus ascertained the fair cash value of all the property of this company in Illinois, the portion thereof to be taxed as "capital stock" was ascertained by deducting therefrom the total value of all the tangible property of the company in Illinois, and the remainder was assessed as such.

This was not an assessment of any part of the property in other States. It is true the value of the whole property, everywhere, is used in the computation by which the value of that part to be assessed is fixed. So, by the rule, the value of shares, the property of stockholders, and the value of debts, the property of creditors, are used in the computation in fixing the value of the entire capital stock, or property, of every kind, of a corporation whose operations are all in Illinois; but this court has repeatedly held that that is not an assessment of the shares or of the debts, and that the tax on such assessment is not a tax upon the shares, which are the property of the stockholders, or a tax upon the debts, which are the property of creditors.

We find no sufficient ground for holding this assessment invalid, and the decree of the Circuit Court must be affirmed.

Decree affirmed.

JAMES H. WILSON, Receiver of the St. Louis and Southeastern Railroad Company

v.

HERMAN G. WEBER.

(96 *Illinois Reports*, 454. *May* 14, 1880.)

A railroad tax will not be enjoined because the distribution of its taxable property, other than its local property, among the several counties through which its road runs, was made by the clerk of the Board of Equalization after the adjournment of the board, when it is made on the basis as fixed by the statute, and the burden on the railway company has not been increased by

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the appointment. This is but a ministerial act resting in computation, and does not require the exercise of any discretion.

APPEAL from the Appellate Court for the Fourth District.

Mr. Bluford Wilson and Mr. J. M. Hamill, for the appellant.

Mr. James K. Edsall, Attorney-General, for the appellee.

Per Curiam: The main question in this case is determined against the appellant, in the case of Ohio and Mississippi R. R. Co. *v.* Weber, ante.

The only new question presented in this case relates to the distribution among the counties of the share of each for local taxation in the value of the "rolling stock" and of the "capital stock."

The statute says that distribution shall be made by the board on the basis of the length of main track in each county. It is not denied that the distribution was correctly made, but it is said the board made no order of distribution, and the secretary of the board made the distribution after the adjournment of the board. The law fixes the basis and rule for the distribution, and the amounts to be distributed were duly ascertained. The computations to make the distribution did not require the exercise of any discretion. The service was merely ministerial, and we cannot regard the want of a formal order on that subject as good ground in a court of equity to invalidate the tax. The company owes the amount of the tax claimed, and no injunction should be allowed on account of a mere irregularity by reason of which it is not shown that the burden upon the company has at all been increased. It may perhaps have been regarded as one of the implied duties of the secretary.

The decree of the court below must be affirmed.

Decree affirmed.

ANTON BINKERT et al.

v.

THE WABASH RAILWAY COMPANY.

(98 *Illinois Reports*, 205. *March* 21, 1881.)

Where no bill of exceptions or certificate of evidence is found in the record of a chancery case, the propriety of the decree must be determined exclusively from the allegations of the bill, and the facts found by the court as stated in the decree, as it must be presumed the evidence was sufficient to sustain such findings. A court of review, where nothing appears to the contrary, will indulge in all reasonable presumptions to sustain the decree of the lower court.

If a decree specially finds to be true every material fact in the bill, and contains no findings at all modifying the effect of the facts thus found, it

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will follow that if the facts charged in the bill are sufficient to sustain the decree, then the decree is not erroneous.

Where the decree, upon a bill to enjoin the levy of a collector's warrant upon personal property of the complainant, issued upon an assessment of the same against a former owner, finds that the mortgage under which the complainant claims was a valid lien on the property prior to the assessment, and delivery of the warrants to the collector, this will amount to a finding that the mortgage was properly acknowledged and recorded, or that possession must have been taken under it before it expired, the presumption being in favor of the finding of the court.

A bill to enjoin the sale of complainant's personal property for taxes levied against a former owner, made the collectors of several counties defendants, among whom was the collector of Scott county, who, by mistake, was named as Coats. There being no service on him, an amendment was made to the bill in which the name of the collector of that county was correctly given, who appeared and answered, and the cause proceeded to final decree, without question as to the regularity of the proceedings. It was objected that the decree being joint, if erroneous as to any one defendant, must be reversed as to all. But the court did not regard that the decree was against Coats, it being intended to be against the collectors only, but held, that whether it was rendered against him or not, it could not, in the slightest manner, prejudice the other defendants.

A copy of a mortgage, and a stipulation of the parties that it might be used in evidence the same as the original, transcribed into the record, but neither of which is in any manner verified, is insufficient, and does not make them a part of the record; and even if they were considered, the stipulation would not make the mortgage evidence or show it was offered in evidence and considered.

The findings of a decree in reference to a matter about which there is no allegation whatever, cannot be sustained; but this rule does not apply to cases where the facts found by the decree have been defectively stated in the bill. Therefore, a statement in a bill, of the making of a chattel mortgage, will fully warrant the court in finding it was a valid lien, in the absence of objection to the sufficiency of the allegation.

A recital in a decree of foreclosure, finding the mortgage to be a prior valid lien, does not render the decree erroneous, as finding a mere conclusion of law. The validity of a mortgage is frequently a mixed question of law and fact, and depending upon the existence or non-existence of other facts and circumstances.

The statute makes a lien for the taxes assessed upon personal property only from and after the tax-books are delivered to the collector, and this lien has no reference to the property originally assessed, but it attaches to all the personal property of the tax-debtor. Therefore, if the person assessed on any article of personal property, executes a valid mortgage upon the same, or makes a valid sale thereof, before the tax-books are received by the collector, the person holding under such mortgage or sale will hold the property free from any lien on the same for the taxes, and a levy upon and sale of the same for the taxes will be enjoined.

The statute makes taxes assessed upon real property a lien thereon from and including the first day of May in the year they are levied until the same are paid. The tax on each tract is kept separate and distinct from the taxes on every other tract, and such tax becomes a debt, not only against the owner, which may be recovered in a personal action, but also a charge upon that particular tract of land and no other tract.

WRIT of error to the Circuit Court of Montgomery county.

Messrs. Wise & Davis, for the plaintiffs in error:

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A mortgage of the rolling stock of a railroad company, to be valid as to third parties, must be acknowledged and recorded as required by the Chattel Mortgage act, and runs only for two years. Palmer *v.* Forbes et al., 23 Ill. 301; Hunt *v.* Bullocket al., id. 320; Hoyle *v.* Plattsburg and Montreal Railroad Co., 54 N. Y. 314.

Taxes on capital stock of a corporation become a lien on all personal property of the corporation from the time the tax-books are received by the collector. Hill et al. *v.* Figley, 23 Ill. 419.

For the purposes of taxation the mortgagor of property is the owner, and the lien for taxes takes precedence of the mortgage, as well as of all other claims and liens.

A warrant for a tax upon capital stock of a corporation creates a lien upon the franchise and intangible property superior to any mortgage thereon made prior to the assessment, even if it be not superior to any mortgage on the tangible personal property.

He who seeks equity must do equity, and the tax-warrants being a lien on the franchise and intangible property, the defendant in error cannot hold such property and at the same time obtain relief in equity, without payment or tender of the tax. Mills *v.* Johnson, 17 Wis. 598; Hilliard on Taxation, 472.

The lien of the State is superior to all liens and claims of individuals or corporations. Atkins *v.* Hinman, 2 Gilm. 449; Dunlap *v.* Gallatin Co., 15 Ill. 7; Dennis *v.* Maynard et al., id. 481; Forth *v.* Pursley, 82 id. 152; Butler *v.* Bailey, 2 Bay, 244; N. & C. Bridge Co. *v.* Douglas et al., 12 Bush. 673; Philips *v.* Rouse, 49 Mo. 586; Harrington *v.* Hilliard, 27 Mich. 271; Gledney *v.* Deavers, 8 Ga. 479.

Messrs. McClernand & Keyes, also for the plaintiffs in error:

A tax is a specific charge or lien upon the property, without regard to its ownership or any prior liens. Dunlap *v.* Gallatin Co., 15 Ill. 7; Dennis *v.* Maynard, id. 477.

The State, in enforcing its lien, is not limited to the interest of the tax-debtor in the property, and may reach the property liable for its payment without regard to liens and transfers prior or subsequent to the assessment. Payment of the taxes due on one specific part of personal property will not release it from levy and sale for taxes upon another part of such property. Capital stock of a corporation is taxable as personal property. Porter *v.* Rockford, Rock Island and St Louis R. R. Co., 76 Ill. 561.

Defendant in error took, under its mortgage, all the personal property subject to the lien thereon for the taxes due on the capital stock and franchise, and is equitably bound to pay them.

Messrs. Hay, Greene & Littler, and Mr. G. B. Burnett, for the defendant in error:

The first point made by the plaintiff in error is that a joint decree, void as to one defendant, is void as to all. There is no decree against Coats, and the decree is not joint, but several. Each defend-

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ant may perform or refuse to perform the decree, and the others will not be responsible for his acts. Besides a party cannot assign for error that which does not affect him. Tibbs et al. *v.* Allen, 27 Ill. 119; Van Valkenburg et al. *v.* Trustees, etc., 66 id. 103; Smith *v.* Hickman, 68 id. 314; Clark *v.* Marfield, 77 id. 258; Richards *v.* Greene, 78 id. 525; Hedges et al. *v.* Mace et al., 72 id. 472; Fonville *v.* Sausser et al., 73 id. 451.

It is also urged that the chattel mortgage is invalid. The mortgage set out in the amended record is no part of the record. There is nothing to show it was read in evidence. To have become a part of the record it should have been preserved in a certificate of evidence. Mason *v.* Blair, 33 Ill. 194; Eaton et al. *v.* Sanders et al., 43 id. 435; Walker *v.* Casey, 53 id. 470; McIntosh *v.* Sanders, 68 id. 128; Brockenbrough *v.* Dresser, 67 id. 225.

When no evidence is otherwise preserved, the findings of fact stated in the decree are conclusive. Sheen *v.* Hogan, 86 Ill. 16.

A tax on personal property becomes a lien only from the time when the warrant for its collection comes into the hands of the collector. Hill *v.* Figley, 23 Ill. 419; Gormley's Appeal, 27 Pa. St. 49.

The taxes assessed upon the capital stock and franchise after the execution of the mortgage will not divest the interest of the mortgagee, and those claiming under the mortgage, as to the other personal property included in the mortgage upon which the taxes have been paid. Gaar, Scott & Co. *v.* Hurd, 92 Ill. 315.

When the mortgage was executed the mortgagor owned nothing more than an equity of redemption, and when the alleged tax lien accrued it could not operate on anything more than such equity of redemption.

Section 253 of the Revenue law declares that the taxes assessed against real estate shall be a lien thereon from and including the first day of May in the year in which they are levied. But the taxes assessed upon personal property are made a lien upon the personal property of the person assessed, from and after the tax-books are received by the collector. Sec. 254.

Section 255 provides that each class of property may, under certain circumstances, be made liable for taxes due upon the other class by the same owner, but it creates no lien whatever. A lien may be perfected under it, by the proper steps, but the section itself, by its own force, cannot raise such a lien. Schaffer *v.* State, 60 Ill. 179. See also Hill *v.* Figley, 23 id. 413; Same *v.* Same, 25 id. 158.

The words of the statute which give a lien on personal property for the tax on other personal property, do not expressly, or by necessary implication, attempt to divest any prior lien or extinguish any interest vested in another party. The lien is given on the property of the person assessed. Sec. 354, Rev. act.

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MULKEY, J.—This was a bill in chancery, filed by defendant in error on the 11th of April, 1868, in the Madison County Circuit Court, against the plaintiffs in error as collectors of taxes of the several counties in this State through which the railway of defendant in error runs, to enjoin the collection of the taxes assessed on the capital stock of the Toledo, Wabash and Western Ry. Co. for the years 1873 and 1874.

It appears from the bill and findings of the decree in this case, that the Toledo, Wabash and Western Ry. Co., on the first day of January, 1873, being then the owner of what now constitutes the railway, rolling stock, franchise, etc., of the Wabash Ry. Co., executed thereon a mortgage, or deed of trust, to the New York Guaranty and Indemnity Company, to secure an indebtedness of the railroad company amounting to five million of dollars, which mortgage, in a few days thereafter, was duly recorded in the several counties through which the road runs; that subsequently, in the years 1873 and 1874, this property was assessed as the property of the Toledo, Wabash and Western Ry. Co.; that default having been made in the payment of the mortgage debt, legal proceedings were instituted in February, 1875, to foreclose the mortgage, and such proceedings were had that a decree was rendered directing the sale of the mortgage property; that the property, in pursuance of the decree, was subsequently sold by a special master, and John W. Ellis, Alexander M. White and others became the purchasers; that the property was duly transferred and conveyed by deed to the purchasers, and the sale and transfer approved and confirmed by the court; that the said purchasers afterwards sold and conveyed the same to defendant in error, and that since that time the defendant in error has been the owner and in the possession and control of the same; that all taxes assessed upon the tangible property had been fully paid, but that the taxes assessed upon the capital stock for the years 1873 and 1874, as above stated, were still unpaid, and that warrants for their collection were then in the hands of the collectors, which they were threatening to levy upon the property of defendant in error. Upon this state of facts, the court below perpetually enjoined the collection of the taxes in question.

The evidence upon which the decree was rendered has not been preserved. No bill of exceptions or certificate of evidence is to be found in the record. The propriety of the decree, therefore, must be determined exclusively from the allegations in the bill and the facts found by the court as they appear in the decree itself, as it must be presumed that the evidence was legally sufficient to support the findings of the court. Indeed, it is a general rule that a court of review, where nothing appears to the contrary, will indulge in all reasonable presumptions for the purpose of sustaining the decree of the lower court.

Upon an inspection of the decree, it will be readily seen that it

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specially finds to be true every material fact charged in the bill, and that, on the other hand, it contains no findings that, in our judgment, at all modify the legal effect of the facts thus found. It must, therefore, follow that if the facts charged in the bill, conceding them to be true, are sufficient to sustain the decree, the Circuit Court committed no error in rendering it.

It is conceded, in the argument, that before the assessment of the taxes in controversy, the Toledo, Wabash and Western Ry. Co. executed the deed of trust or mortgage through which the defendant in error claims title, on the property now sought to be taken in satisfaction of the taxes; but it is claimed that the mortgage was neither acknowledged and recorded as a chattel mortgage nor was possession taken of the mortgaged property until after the warrants for the collection of the taxes came into the hands of the collectors, and that, therefore, notwithstanding the mortgage, the property is liable for the taxes. But the answer to this is, that the decree specifically finds that the mortgage under which defendant in error claims was a valid lien on the property prior to the assessment and delivery of the warrants to the collectors, and if this finding of the court is true, and so we must consider it, the mortgage must have been properly acknowledged and recorded, or possession must have been taken under it, provided the statute in reference to chattel mortgages has any application to railroad mortgages, like the one in question, of which we at present express no opinion. By way of reply to this, it is said that the decree also shows that the mortgage expired on the 1st of January, 1875, and that the commencement of the suits of foreclosure and the appointment of a receiver did not occur until in the following month, and that, by reason of the delay in taking possession of the mortgaged property, the lien under the mortgage was lost, and the tax lien thereupon attached. The trouble with this position is that it assumes that possession was not taken of the mortgaged property until after the warrants came to the collectors' hands, a fact which does not appear by the decree. If any of the findings of the decree were necessarily incompatible with the fact that the mortgage was a valid lien on the property before the warrants came to the hands of the collectors, the argument would have much force in it, but they are not. For aught that appears from the record, the mortgagee may have taken possession of the property at the time of the execution of the mortgage, and continued in possession till superseded by the receiver. There is no proof on this subject one way or the other, and all presumptions must be indulged in favor of the findings of the court.

Even the mortgage is not before us, to enable us to determine what, if any, provisions it contained on that subject. It is true, we find in the transcript what purports to be a copy of such a mortgage, and also what purports to be an agreement between the parties to this suit, that such copy might be used in evidence with

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like effect as if the original, but neither the agreement nor the supposed copy is in any manner verified except by simply being copied into the transcript by the clerk. That, as has often been held, is not sufficient, and does not make them a part of the record. The law has prescribed the manner in which this may be done when desired, but there has been no compliance with it in this instance, even if there was any intention of doing so. It is well settled that even exhibits to bills and answers, when sought to be used as evidence, when not of such character as the court will take judicial notice of their genuineness, must, like any other instruments of evidence, be satisfactorily identified and proven. But even if we were permitted to consider these instruments, there is nothing in the record to show the supposed copy was used in evidence, for the stipulation, assuming it to be one, does not make it evidence in the cause, but only authorizes it to be done if desired.

But it is further suggested, that the decree, in so far as it finds the mortgage to be a prior valid lien on the property, is not based on any allegation in the bill to that effect, and for that reason it must be regarded as both erroneous and inoperative.

It is conceded that the findings of a decree with reference to a matter about which there is no allegation whatever, cannot be sustained. But this principle has no application to cases where the facts found by the decree have been merely defectively stated in the bill. There is no question as to the fact that the bill in the present case distinctly avers the making of the mortgage, and as every valid mortgage of necessity implies a lien, we are of opinion that this averment, in the absence of objections to its sufficiency, fully warranted the court, if the facts justified it, as we must presume they did, in finding the mortgage was a valid lien, as stated in the decree.

It is finally objected, that the finding of the decree, in this respect, is a mere conclusion of law, and for that reason, also, it is erroneous and inoperative.

We do not regard this position tenable either. It is the constant and universal usage for courts of equity to investigate and determine, as matters of fact, questions of this character. They are known to the law as mixed questions of law and fact, and when they arise in a court of law, if required, they have to be submitted to a jury, though not precisely in the form the present question is presented.

Whether a lien is created by an instrument purporting to be a mortgage must, of necessity, depend, in every case, upon a variety of circumstances. Every condition essential to the validity of a contract, in addition to the requirements of the statute, if, as before stated, it has any application to mortgages of this kind, is involved in such an inquiry.

If, for illustration, the instrument has been obtained by fraud,

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proof of such fact, when set up by way of defence, will defeat the lien; and so of various other defences that might be suggested. In the case supposed, assuming the mortgage to be regular on its face, the existence or non-existence of the lien would depend, solely, upon the fact whether it had been obtained by fraud or not.

Of course, where no question is made with reference to a mortgage, except what appears on its face, the court will then say, as matter of law, whether the instrument is valid as a mortgage, or not; or, in other words, whether or not it creates a valid lien. Yet that is but an illustration of the general principle, that where the facts are conceded or definitely ascertained, the court will then determine, as matter of law, the conclusions to be deduced from them.

Whether an instrument is operative as a mortgage, or, in other words, creates a lien upon the property, is no more a mere conclusion of law than whether a given instrument is the last will and testament of an alleged testator, or whether one claiming as heir or executor is entitled to a particular estate. All issues of this kind present, for the determination of the court, mixed questions of law and fact. We are clearly of the opinion there is nothing in this objection.

For the purposes of taxation, so far as this controversy is concerned, we agree with plaintiff in error, there is no difference between the tangible and intangible property, and the rights of the parties to it must be determined just as though no such distinction existed.

We regard the situation of the parties precisely as if the taxes in question had been assessed upon the tangible property instead of the capital stock. If the property of the present company could be held for the taxes in the one case, it can in the other. And whether it can be held in either depends upon whether the law, by reason of the assessment of personal property, gives a specific lien upon it for the taxes, that follows it into whosesoever hands it may happen to come, until they are paid; and this really is the most important question involved in the case.

In support of the affirmative of this proposition, counsel for plaintiff in error have cited a number of cases, but, in our judgment, none of them sustain it. Most of them are cases in which the tax sought to be enforced was assessed upon real property, which is governed by principles essentially different from those which are applicable to assessments on personal property.

Under our system of taxation, and that of other States, so far as we are advised, the tax on each tract of land is kept separate and distinct from the tax on every other tract, and such tax not only becomes a debt against the owner, which may be recovered in a personal action, as in other cases, but a charge upon that particular

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tract of land, and no other, and upon the payment of such tax the owner may sell and convey the same, free from all charges on account of taxes assessed against other tracts. But, in default of such payment, the law authorizes, in addition to the remedy given against the owner personally, a direct proceeding against the land itself, by which judgment may be had against it, just as though it were a person, and it may finally be sold under such judgment. Inasmuch, therefore, as the land, as well as the owner, is primarily liable for the tax, whoever purchases it, or otherwise succeeds to the title, must necessarily take it subject to the charge until the tax is paid. If any such specific charge is created upon a personal chattel by reason of its assessment, it is clear the law has provided no means by which the public may know, as in the case of real property, the extent of such charge. Indeed, the very observance of the law prescribing the manner of keeping tax-books renders it absolutely impossible to even learn its extent.

So it would follow, if one, any time after assessment, though months before the taxes were due, should buy a horse, cow, or other article of property, and the party to whom it was assessed should happen, in the meantime, to fail, the only way the purchaser could obtain a clear title to the property would be to pay all the personal taxes of the insolvent tax-debtor, and this, in some cases, might be equivalent to a loss of the property altogether. If such were the law, no man could know when he was safe in buying property, for the effect of it would be to create an almost infinite number of secret liens—which the law ever abhors—against which no prudence, care or foresight could protect one. Nothing but a clear, unequivocal declaration of the law-making power would satisfy us that the legislature ever intended to sanction such a state of things.

If it had been the intention of the legislature to create a specific charge upon every article of personal property, to the extent of the tax assessed on its valuation, as it has on each tract of land, some provision certainly would have been made by which the extent of the charge could be definitely ascertained, so as to prevent great hardships and frauds upon innocent purchasers. And since this has not been done, in the absence of any express provision to that effect, we must hold that it was not the intention of the legislature to create any such charge.

We do not deem it necessary to review the various provisions of the statute that may be supposed to have some bearing on the question. To do so would lead to unwarrantable prolixity. Suffice it to say, we have carefully examined the entire Revenue act, and do not find in it a single section, clause or sentence that seems in the slightest degree to favor the view suggested, but, on the contrary, many of its provisions clearly lead to the very opposite conclusion. The whole revenue system is purely statutory, and it is well settled

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that all tax liens exist only by reason of positive statutory enactments.

What we have here said with reference to the inconveniences and hardships growing out of secret liens, is directed against the hypothesis that such liens, under our revenue system, have any existence until after the tax-books come into the hands of the collector. Of course these same inconveniences exist to a limited extent after that time, but they are not to be extended by judicial construction.

While the right to raise revenue by taxation is necessarily inherent in every government, yet, in all constitutional governments, like ours, this right is regulated by law, and can only be exercised in the manner and for the purposes specified in the constitution and the statutes of the State.

This question is not left in doubt by our legislature. It has spoken in terms that leave no just ground for misapprehension. Section 253, of the Revised Statutes of 1874, provides as follows: "The taxes assessed upon real property shall be a lien thereon, from and including the first day of May in the year in which they are levied, until the same are paid."

The next section, 254, is in these words: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the tax-books are received by the collector."

By virtue of one or the other of these provisions every tax lien exists. The statute having in both cases fixed a definite time when the lien shall commence, is equivalent to saying it shall not commence before that time. The lien given for the personal tax has no reference to the property originally assessed, but it is a lien that attaches to all the personal property of the tax-debtor, without regard to whether it was previously assessed or not. The very wording of the section directly negatives the idea that the lien has any special reference to the previously assessed property, or that it creates any lien at all upon such property, unless it belongs to the tax-debtor at the time the tax-books come to the hands of the collector. Had the legislature intended anything of that kind it would have provided that the taxes should be a lien upon the property assessed, and not, as it has, upon the property of the person assessed. When the tax-books come to the collector's hands, the personal taxes at once, and not before, just like an execution, become a lien upon all the personal property which the person assessed then owns, without regard to what he may have owned when the assessment was made. This is the plain provision of the statute, and the construction now given it is in strict conformity with the previous decisions of this court.

It is further objected that the decree in this case is void as to one of the defendants, and being a joint decree it must be reversed

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as to all. It is admitted that counsel for plaintiff in error state the law correctly on this subject, and the only question is whether the case is brought within the principle.

The bill, after setting out the interest of the defendant in error in the property sought to be charged with the taxes, proceeds to charge that the collectors of the several counties through which the road runs, including that of Scott county, had in their hands certain tax-warrants which they were about to levy upon the property in question. The bill then charges that certain persons, naming them, are respectively collectors of these counties, among whom one John H. Coats is mentioned as collector of Scott county, and a summons was issued against him as such.

R. A. Blair, the then sheriff and collector of Scott county, returned this summons with an indorsement thereon, to the effect that the same was not served, for the reason there was not then, and never had been, any one in his county answering the description of "John H. Coats, collector of Scott county."

Subsequent to this return, and without any further steps being taken to bring Coats into court, an amendment was filed to the bill, in the entitling of which the name of Robert A. Blair, the real collector, was substituted for that of Coats, and the latter's name does not further appear in the proceedings. After the substitution of Blair's name for Coats, Blair, as collector of Scott county, filed an answer to the amended bill, and the cause proceeded to decree without any question being made as to the regularity of the proceeding.

Under this state of facts we do not understand any decree was entered against Coats. The objection urged, therefore, has no foundation in fact. But even if this were not so, we do not regard the objection well taken for other reasons. It clearly appears from the record that the suit was originally instituted against Coats under a mistake of fact. The suit was brought against him in a supposed official character, which the return of the officer and the amended bill shows he did not sustain. There was really no one *in esse* answering the description of John H. Coats, collector of Scott county, and it therefore follows, whether the decree was or was not rendered against him cannot in the slightest manner prejudice the parties here complaining. The record shows conclusively that if there be such an individual as John H. Coats, he cannot, as a mere private individual, have the slightest interest in the suit that could in any manner affect the rights of plaintiffs in error, and such being the fact it is clear they have no right to complain on the ground suggested.

Perceiving no error in the record, the decree of the Circuit Court is affirmed.

Decree affirmed.

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WALKER, J., dissenting.—I am unable to concur in the conclusion announced in this case, or the reasoning by which it is reached. It was stipulated that copies of the mortgage, and other documents therein referred to, might be read in evidence in place of the originals. They were found on file in the case, and the clerk, after copying them, certifies that the transcript thus made is a true, perfect and complete record of the proceedings in the case. It is therefore reasonable to conclude that they were read on the hearing. The bill described the mortgage, its foreclosure and the sale of the property, and its purchase by defendant in error, as grounds for the relief sought. To succeed, defendant in error was compelled to prove the existence of the mortgage as alleged, and I am compelled to believe that the copy was read in evidence. The stipulation was made to enable defendant in error to so read it, and as they could not have recovered without reading it or the original, and as the original is not on file in or among the papers in the case, and the copy is, the conclusion, to my mind, is irresistible, that the copy was read in evidence. Had a deposition been so filed the presumption would be that it was read, although there was no certificate by the court that it had been. Then why exclude the copy of the mortgage thus found, and when it had been agreed that it might be read? In regard to reading depositions, there are no stipulations that they may be read, but the parties have a right to read them on a hearing, and because of that right the law presumes they were read. So here, under the stipulation, complainant had the right to read the copy of the mortgage, and why not presume it was read?

On turning to the copy of the mortgage, certified by the clerk to be a part of the record, we find that it executed and was acknowledged in the State of Ohio. Nor was there any, the slightest effort to conform to the Chattel Mortgage law, either in its acknowledgment, or having it entered on the docket of the justice of the peace where the property was situated. The property on which the tax became a lien was personal, and was included in the mortgage, and was of the character embraced in and referred to in the Chattel Mortgage law; and the railroad was an intangible person, and derived its entire power to make a mortgage by the statute, and, in doing so, it must conform to the statute authorizing the corporation to make or receive a mortgage. A failure to do so renders it void, as it would if made by an individual, and no reason is perceived why there should be any distinction made between natural persons and corporate bodies. If there are reasons, it is for the General Assembly, and not the courts, to allow them. The Chattel Mortgage law, in terms, embraces all mortgages on chattels. This court has uniformly held, and in many cases, that in executing such instruments, a failure to comply with the statutory requirements renders them void as to third per-

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sons, and for the same reason I regard this mortgage as void so far as it related to personal property.

If it was void, as I think it was, although prior in date to the tax-warrants, as against them the mortgagee or trustee did not acquire a superior lien. When the warrants were delivered to the collectors, they became a lien superior to that of the mortgagee, and a foreclosure could not affect that lien, as it had attached long before complainant acquired title. The warrants still remained in the hands of the collectors, but had not been executed because of restraining orders and injunctions, until after the foreclosure and sale of the property, under the decree. The State should not be thus deprived of the power to enforce the collection of its revenue, by such restraining orders.

I, therefore, hold that this decree should be reversed.

JOHN SHOUP, et al.

v.

THE CENTRAL BRANCH UNION PACIFIC R. R. Co.

(24 *Kansas Reports*, 547. *July Term*, 1880.)

S. entered into a contract in writing, in 1868, with a railroad company, to purchase certain real estate, and covenanted to pay all taxes which should be lawfully imposed on the premises. Under the contract, he went into possession of the land, paid a small portion of the purchase-money, and made valuable improvements. He defaulted as to the payment of taxes for the years 1873, 1874, 1875, and 1876. In May, 1877, there was a settlement between S. and the company, and S. relinquished all his right in the land and all his improvements to the company; the company accepted the surrende of his written contract, and released all its claims against him under the covenants thereof. *Held*, That S. was thereby relieved of all duty or obligation to pay past or future taxes on the premises; and after such settlement, S. was not debarred from acquiring a valid tax title to the premises, on account of his former relation with the railroad company, under the contract of purchase.

The omission of the official title of the assessor after his signature to the oath to his official return of the valuation of real estate, and the absence of the official seal of the county clerk on the jurats to the oath of the assessor attached to such return, and upon the affidavits of the publication of the tax levy and tax sale, are mere irregularities, and will not invalidate the tax proceedings based thereon.

The omission of the name of the person to whom a tract of land is assessed, from the notice of the tax sale, and from the notice of the expiration of the time for redemption, will not invalidate the title conveyed by the tax deed to the tax purchaser of the real estate.

ERROR from Jackson District Court.

Ejectment brought by the Central Branch Union Pacific R. R.

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Co. against John Shoup, Winfield Shoup and Thomas H. Phillipi, to recover the possession of the southeast quarter of section number thirty-five, in township number five of range number sixteen, situate in Jackson county. The petition was filed April 12, 1878, and alleged that the plaintiff was the owner of the land in fee. John Shoup filed a general denial. Winfield Shoup denied that the plaintiff was seized in the fee of the land and Thomas H. Phillipi, in his answer, denied title in the plaintiff, alleged that he was the owner and in the possession of the premises, and demanded that the claim of plaintiff be determined null and void. Plaintiff filed a reply, containing a general denial to the answer of Phillipi. On the second trial, at the April Term of the court for 1879, the case was submitted to the court, without a jury. At the request of all the parties, the court made certain findings of fact, separately from its conclusions of law. The conclusions of law were:

"1. The plaintiff is, and was at the commencement of this action, the owner in fee simple of the lands described in plaintiff's petition, and is and was entitled to the possession thereof, and the defendants were and are unlawfully keeping the plaintiff out of the possession thereof.

"2. The said John Shoup, defendant, could not, on account of the relation in which he stood to the plaintiff, acquire a valid tax title on said tract of land for the taxes referred to in the foregoing findings of fact.

"3. The said tax deed is null and void by reason of the defective and insufficient execution of the prerequisites to the execution of said tax deed.

"4. The defendant, Thomas H. Phillipi, is entitled to recover of the plaintiff (before the plaintiff shall be let into possession of said land) the full amount of all taxes paid on said land, with interest at the rate of fifty per cent. per annum up to the 26th day of June, 1877, the date of said tax deed, including the costs of said deed and the recording of the same, with interest on said amount at the rate of twenty per cent. per annum to this date (April 19, 1879), amounting in the aggregate to the sum of $367.28."

Judgment was rendered, adjudging to the railroad company possession of the premises described in the petition, but requiring as a condition before it should be let into possession that it should pay to Thomas H. Phillipi the taxes paid, with interest at the rate of fifty per cent. per annum up to June 26, 1877, (the date of the tax deed,) including the costs of the deed and the recording of the same, with interest on said amount from said date to the trial, at the rate of twenty per cent. per annum, amounting to $367.28. All parties filed motions for a new trial, and to vacate certain findings. These motions were overruled, and exceptions taken. Defendants bring the case here, and plaintiff files a cross-petition in

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error; therefore both parties complain of the judgment, and ask for a review of the proceedings in the district court.

John C. Douglass and Hayden & Hayden, for plaintiffs in error:

The court erred in the third finding of fact, and in the first conclusion of law. But if there can be any doubt as to the construction which should be placed upon the third finding of fact, the admission made by the parties upon the trial shows that the railroad company, in consideration of the surrender of the contracts, land and improvements by Shoup, released "all its claims against said John Shoup under and by virtue of the covenants on the part of said John Shoup, in the said contracts and each of them contained." The case then stands upon this point as though Shoup, having failed to pay the taxes during the continuance of his contracts, had, upon the surrender thereof had an accounting and settlement with the railroad company therefor, and had then, in pursuance of such settlement, paid to the railroad company an amount sufficient to redeem the land from the delinquent taxes. Can it be held in such case that if the railroad company had failed to use the money for the purpose of redeeming the land, but allowed the same to be conveyed for taxes, that John Shoup might not thereafter have acquired a valid title from the purchaser? (21 Kas. 712; 20 id. 709.)

The finding of the court below that the tax deed was in due form, is evidence that no defects in the tax sale or proceedings exist, except such as are specially found by the court. The most of the defects appearing in the tax-sale proceedings are plainly "mere irregularities" within the meaning of § 113, ch. 107, Gen. Stat. 1868.

In the recent case of Stockle *v.* Sillsbee, in the Supreme Court of Michigan, (2 N. W. Rep. N. S. 900,) Judge Cooley said: "But the time has gone by, if it ever was, when the proceedings of taxing-officers are to be criticised with microscopic nicety, and the exact time and method of every step examined to detect a departure from the law, however insignificant or unconstitutional. The policy of the law is, that parties shall pay legal taxes, even though there may be some irregularities in demanding them, and that they shall complain to the courts of those errors only which may injure them."

Even in the absence of a statutory provision similar to § 113, supra, the old rule was that tax proceedings, although not exactly and punctiliously correct, are yet sufficiently so for legal purposes, in any case, if no error was committed which could prejudice the person taxed. (5 Mich. 151; 16 id. 162; 33 id. 29; Blackwell on Tax Titles, 262–3; Cooley on Taxation, 219, 220.)

The question of irregularities in tax sales and the effect of curative statutes is discussed in Cooley on Taxation, 230, and it will be seen that the Kansas prospective curative law, the most far-reaching and radical one in existence, is not even mentioned; but under a

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less sweeping law (Iowa) even the entire omission of a notice of sale is held not to render the sale or deed void. (16 Iowa, 508; 29 id. 356, 388–9; 31 id. 64, 66; 37 id. 568; 38 id. 141; 3 N. W. Rep., N. S. 604.)

But even if said § 113 will not bear the construction claimed by us, still we claim that the defects in the tax-sale proceedings as shown by the findings of the court below go to the form only of the proceedings; and the rule is well settled, that when the objection is a mere non-compliance with some direction of the statute, notwithstanding which the tax may have been entirely just, it ought not to have the effect of invalidating the proceedings. (11 Wis. 470, 497. See also 19 id. 619; 9 Kas. 477, 487; 21 id. 83, 87; 9 Pa. St. 170.)

The most serious defect found in the tax proceedings is the omission of the name of John Shoup in the redemption notice, but the notice being perfect in all other respects the defect is clearly a mere irregularity; and hence, under our statute, it does not affect the validity of the deed. (21 Wis. 174, 178, 331, 336; 1 Watts, 42; 4 id. 363.)

Everest & Waggener, for defendant in error:

The judgment of the court below setting aside the tax deed which had been issued on the land in dispute, was correct. John Shoup was under obligation, by his contracts with the railroad company, and by reason of his occupation of the land, to pay, and was liable for the payment of the taxes on the land, not only for the year 1873, but for the taxes of the years 1874, 1875 and 1876. At the time of the levy and assessment of all these taxes, he was in possession and occupancy of the land, and had the use and benefits thereof from the spring of 1869, until some time in May, 1877. We submit, then, that Shoup, under the quitclaim deed executed to him by Charles L. Flint, acquired no title to the land in controversy. All the title which Flint had was by virtue of the tax certificate that had been issued to Tyler and assigned to him, and upon which he had procured a tax deed to be issued to himself. The acquisition of this tax title by Shoup was under the circumstances only a compliance with his agreement "that he would regularly and seasonably pay all such taxes and assessments as should lawfully be imposed on such premises." To sustain such a title in Shoup would be to hold that he could violate the terms of his contract, and practice a fraud upon the owner of the land. He was in possession of the land at the time that the taxes were levied, at the time of the tax sale, and at the date of the execution of the tax deed. (7 Kas. 110, 121, et seq., and cases cited; 8 id. 90; see also 19 Wis. 446.) The principle of law is well settled, that a person in possession of lands, whose duty it is to pay the taxes at the time of the assessment, cannot permit the same to be sold for taxes, and acquire directly any title based upon a failure to pay such

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taxes. (22 Wis. 175; 24 id. 229; 31 id. 359; 27 Cal. 300; 36 id. 322.)

The purchase of the tax title by Shoup, whose duty it was to pay the taxes, operated as a payment only, and he acquired no rights or title to the land. 97 U. S. 181, and cases cited.)

The same rule applies to a vendee as to a tenant. He cannot acquire a title adverse to his vendor by the purchase of the land at a tax sale, especially so when under obligation to pay taxes. (20 Kas. 639, 643.)

Shoup, having acquired no title by reason of the non-payment of the taxes, his quitclaim deed to Phillipi passed no title to him. (11 Johns. 91; 9 Cow. 13; 1 Paige Ch. 473.)

Where a person relies on a mere quitclaim of the interest which a party may have in property, he does so at his peril, and must see to it that there is an interest to convey. He is presumed to know what he is purchasing, and takes it at his own risk. (16 Minn. 26, and cases cited; 4 id. 282; 10 id. 141; 8 Kas. 597, et seq.; 14 id. 148.)

The pretended notice of the expiration of the time for redeeming said lands, given by the county treasurer, is of no effect for a non-compliance with the law in force at that time. This notice is void for not stating the name of the person to whom the land was assessed. This is a prerequisite required by the statute for the benefit of the land-owner, and no valid tax deed can be executed until this provision of the law has been complied with. (Gen. Stat. 1868, ch. 107, § 110; 7 Wend. 148; 16 id. 348, 550; 63 Ill. 341; 52 id. 43; 38 id. 440; 50 Barb. 639; Burroughs on Taxation, 314, 315, 316.) This is not a mere irregularity, but a vital provision of the law which should be strictly complied with before the land-owner can be divested of his title. (21 Wis. [star page 600], 607; 24 id. 664.)

It is not shown by any finding of fact, or by any evidence, that the county treasurer ever caused to be posted a list or notice of unredeemed lands in any public place, or any place in his county, or that he posted any such notice in his office. The failure to comply with this provision of the law is fatal. It was just as essential as the publication of the notice in a newspaper, and is by statute made a prerequisite. (Gen. Stat. 1868, ch. 107, § 110, latter part.)

As the record does not contain the evidence produced on the trial in the court below, and as no special finding was requested or given as to the fact whether any such notice was ever posted, as is required by the latter part of § 110, we submit that the general judgment of the court adjudging the tax deed void, and the claim of the title thereunder be held for naught, will be upheld by this court, upon the well-settled doctrine that errors are never to be presumed, and that in the absence of anything being shown in the record to the contrary, it is conclusively presumed that sufficient

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evidence was produced to sustain the judgment of the court below. (22 Wis. 175; 31 id. 359; 24 id. 229.)

There are very many questions of fact, errors, and fatal omissions, which might have been shown in the court below, to sustain the judgment and the third conclusion of law; and the well-settled principle of law is, that error will never be presumed, but must be affirmatively shown; and where the record is silent, no error will be presumed. It does not even appear affirmatively by the transcript annexed to the petition in error, that all the conclusions of fact or conclusions of law made or found by the court below are contained in the record here. This court cannot say that the judgment of the district court in any respect, or any of its findings, is unsupported by evidence, as the record does not purport to contain all the evidence in the case. It is claimed that the third finding of fact is unsupported by the evidence, and is contrary to the evidence, as shown in the bill of exceptions, but how that fact might have appeared, had all the evidence been preserved, this court cannot say. (8 Kas. 38, 466; 15 id. 378.)

HORTON, C. J.—The trial court adjudged that the railroad company was the owner in fee of the premises in controversy at the commencement of this action, but required the company to pay to Phillipi taxes, interests and costs amounting to $367.28, before it should be let into possession. Both parties are dissatisfied with the judgment. Plaintiffs in error claim that the tax deed of June 26, 1877, vested in Charles L. Flint an absolute estate in fee to the land; that such title was transferred by Flint to John Shoup on January 18, 1878, and from Shoup to Phillipi on February 6, 1878. The defendant in error contends that John Shoup was under a duty to pay all the taxes; that his quitclaim deed to Phillipi passed no title, interest or lien; therefore, the order requiring the railroad company to pay taxes, interest and costs as a precedent condition to being let into possession, was wholly erroneous.

Our attention is first called to the second conclusion of law of the court, "that said John Shoup could not, on account of the relation in which he stood to the railroad company, acquire a valid tax deed on the land." This conclusion, we suppose, is intended to be based upon the following findings:

1. On September 5, 1871, the president of the United States of America executed and delivered to the said Central Branch Union Pacific R. R. Co., plaintiff, under and in accordance with the treaty concluded between the United States and the Kickapoo Indians on or about May 28, 1863, a patent for numerous tracts of land, including the southeast quarter of section thirty-five, in township five, south, of range sixteen, east, in Jackson county, Kansas, and thereby conveyed said land to the plaintiff; and the same is still owned

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by the plaintiff, unless the title has been divested by the proceedings hereinafter mentioned.

2. On September 24, 1868, the defendant John Shoup entered into a contract in writing with the plaintiff, whereby the said John Shoup agreed to purchase, and the plaintiff agreed to sell, the west half of said quarter-section of land for $680, in nine annual payments, with interest thereon annually at the rate of ten per cent. per annum; and the said John Shoup covenanted in said contract with the plaintiff that he would regularly and seasonably pay all such taxes and assessments as should be lawfully imposed on said premises. Said contract was numbered 531. And on October 7, 1868, the said John Shoup entered into a contract in writing with the plaintiff, whereby the said John Shoup agreed to purchase, and the plaintiff agreed to sell, the east half of said quarter-section of land for $680, in nine annual payments, with interest thereon annually at the rate of ten per cent. per annum; and the said John Shoup covenanted in said contract that he would regularly and seasonably pay all such taxes and assessments as should be lawfully imposed on said premises. Said contract was numbered 555.

3. The said John Shoup entered into the actual possession and occupation of said tracts of land, together being the southeast quarter of section 35, in township 5, of range 16, in said Jackson county, under said contracts numbered 531 and 555 respectively, in the spring of the year 1869, and he so remained in possession and occupation of the said east half of said quarter-section under said contract number 555 until August 17, 1875, and he so remained in possession of the said west half of said quarter-section under said contract number 531 until May 17, 1877. At said dates respectively the said John Shoup, having paid only a small part of the purchase-money, but having made valuable improvements thereon, and being unable to make further payments, voluntarily surrendered said contracts and all future rights or benefits thereunder to the plaintiff, with the understanding that the plaintiff released him from making any further payments under said contracts, and from all future liability under or upon any of the covenants of said John Shoup contained in said contracts.

4. On the surrender of said contract No. 531 for the west half of said quarter-section, on May 17, 1877, the said John Shoup entered into a contract in writing with the plaintiff for the lease of said west half for the term of eight months, which was afterward extended by agreement until February 1, 1878; but said lease contained no agreement as to payment of taxes, and the said John Shoup did not remove from said premises on surrender of said contract No. 531, May 17, 1877, but remained thereon under the provisions of said lease, until the expiration thereof; and he continued to occupy said land, together with his son, Winfield Shoup, defendant, until the commencement of this action.

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5. The said John Shoup did not pay the taxes and assessments, nor any part thereof on said southeast quarter of said section 35, township 5, range 16, nor on any part thereof, for the years 1873, 1874, 1875, and 1876; nor for any of said years—neither did the plaintiff, nor any other person, company or corporation do so.

13. On June 26, 1877, said Charles L. Flint presented said tax certificate No. 145 to the county clerk of said county of Jackson, and said county clerk executed, signed, sealed, acknowledged and delivered a tax deed for said tract of land to the said Charles L. Flint. Said deed is in form as prescribed by the statute. And the same was filed for record, in the office of the register of deeds of said county of Jackson, on June 27, 1877, at eight o'clock A. M., and was duly recorded in book P, at page 542. The amount of the fee paid the county clerk for said deed was $1, and the fee for recording the same, paid by the said Charles L. Flint, was $1.25.

14. On January 18, 1878, the said Charles L. Flint executed, signed, acknowledged and delivered to the defendant, John Shoup, a quitclaim deed for said tract of land, and said deed was filed for record in the office of the register of deeds of said county of Jackson, February 8, 1878, at nine o'clock A. M., and duly recorded in book Q, at page 371.

15. On February 6, 1878, the said John Shoup, defendant, and Ann E. Shoup, his wife, executed, signed, acknowledged, and delivered to the defendant, Thomas H. Phillipi, a quitclaim deed for said tract of land, and said deed was filed for record in the office of the register of deeds for said county of Jackson, February 21, 1878, and duly recorded in book I, at page 373.

16. Afterward, on said 6th day of February, 1878, the said Thomas H. Phillipi let and leased said land by a written indenture for one year to the defendant, Winfield Shoup, a son of the defendant, John Shoup, and the said Winfield Shoup and John Shoup, defendants, were living together and occupying said quarter-section of land at the time of commencing this action, and keeping the plaintiff out of the possession thereof.

The argument of counsel for defendant in error upon these findings, is, that the acquisition of the tax title, by John Shoup from Flint, was only a compliance with the terms of his written contract of purchase to regularly and seasonably pay all the taxes and assessments as should be imposed lawfully on the land; that the purchase of the tax title from Flint, operated as a payment of the taxes only; that having only redeemed the land from taxes by his purchase, his quitclaim to Phillipi passed no title, or lien for taxes, or for anything else. This argument, although plausible, and having some little foundation from the peculiar wording of the third special finding of fact, cannot be upheld, in view of the admission made by the parties on the trial, viz.:

"That at the time of the surrender of each of said contracts,

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numbered 555 and 531 respectively, and mentioned in the third finding or conclusion of fact of the court herein, it was mutually agreed and understood by and between the said plaintiff (defendant in error) and the said John Shoup, that he should relinquish all his claims in and to each of said tracts (of land) under and by virtue of the said contracts respectively, and all his improvements on the said premises; and in consideration thereof, the said plaintiff at the time of such surrender of said contracts, released all its claims against the said John Shoup, under and by virtue of the covenants on the part of said John Shoup in said contracts and each of them contained."

Under this admission, the railroad company had no claim or right of action against Shoup at the date of the deed from Flint to him, to wit, January 18, 1878, for any default from his non-payment of the taxes, because prior to January, 1878, viz., on August 17, 1875, and on May 17, 1877, there had been such settlements between the railroad company and Shoup, that the company released all its claims against him under and by virtue of the written contracts. A person under obligation to pay taxes cannot, upon the sale of such taxes, acquire a valid title founded upon his default, but where there is no duty or obligation to pay taxes there is no default. Even if default had occurred, the defaulting party may be relieved from such non-performance by express contract with the owner of the land, and thereafter he is not inhibited from procuring a tax title. When Shoup surrendered all his rights in the land, and gave up all his improvements to the railroad company, he was absolved from all obligation or duty, under the terms of settlement, from paying past or future taxes. The transactions between the parties about the purchase of the land and the payment of taxes had been closed up; and past, as well as future liability, ceased. The railroad company, under the settlements, assumed virtually the duty or obligation of Shoup to discharge the taxes for 1873, 1874, 1875 and 1876, and as on May 17, 1877, the land was still redeemable, and as the tax deed to Flint was not executed until June 26, 1877, the company had ample time to pay all back taxes, and prevent the issuance of a tax deed. After the release by the company to Shoup of all liability, he was not debarred by any relation under the written contracts from acquiring a valid tax title for the taxes set forth in the special findings; nor was his subsequent occupation of the land, as tenant or otherwise, any obstacle to his acquisition of such a title. Perley *v.* Taylor, 21 Kas. 712; Weischelbaum *v.* Curlett, 20 Kas. 709.

We pass next to consider the alleged defects in the tax proceedings. The third conclusion of law of the court is, "that said tax deed is null and void, by reason of the defective and insufficient execution of the prerequisites to the execution of said tax deed." It is claimed that the following findings support this conclusion:

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6. The assessor's roll for Whiting township (in which township said land is located) for the year 1873 was returned to, and filed in the office of the county clerk of Jackson county on June 21, 1873, and on said day the oath of the assessor to his assessment roll was administered by E. D. Rose, county clerk, and the same was reduced to writing on one of the pages of said assessment roll, and was signed by Charley Shedd, but neither the word "assessor" nor any other official designation followed said signature, but it was stated in the body of the writing that said Charley Shedd was assessor of Whiting township. The jurat to said oath was signed by E. D. Rose as county clerk, but no official seal nor other seal was ever affixed thereto. On said assessor's roll the said quarter-section of land was assessed in the name of John Shoup as the owner thereof, and the land was designated and valued as follows: "John Shoup, owner. S.E. ¼ sec. 35, T.5, R.16; 160 acres; 5½ per acre. Improvements 75. Total value 955." Neither the words dollars or cents, nor any abbreviations or characters denoting either, appear in said assessment roll relating to said land, but said assessor's roll was properly ruled into appropriate columns, and the assessed value appears in the appropriate column.

7. The tax roll of said Jackson county for the year 1873 shows the assessment of said quarter-section of land in the name of J. Shoup, and said name is set opposite to and in the same line with the description of said land, to wit: The S. E. ¼ sec. 35, T. 5, R. 16; and the valuation thereof, $955; and on said tax roll the said J. Shoup appears as the owner of said quarter-section of land; and the total amount of taxes charged against said land on said roll is $46.77, besides penalty, $4.68, making a grand total of $51.45.

8. The county treasurer caused to be published in due time a notice of the tax levy for the year 1873, and an oath was taken by the publisher of the Holton Express to the due publication of said notice, and the same was reduced to writing and signed by Frank A. Root as such publisher, and the jurat was signed by E. D. Rose as county clerk, but no seal of office or other seal was ever attached thereto, and the same was duly filed in the office of the county clerk of said county.

9. The taxes on said quarter-section of land not being paid for the year 1873, the county treasurer issued his notice, on March 3, 1874, that the same would be sold on the first Tuesday of May, 1874. Said notice was accompanied by a schedule describing the lands by numbers and subdivisions, but no name was set opposite the said S. E. ¼ sec. 35, T. 5, R. 16, showing the ownership thereof as on the tax roll, and it could not be ascertained from said notice who was the owner of said land, nor in whose name it was assessed. Said notice was published in the Holton Express, March 6, March 13, March 20, and March 27, 1874, and an oath was taken by the

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publisher of said newspaper, and the same was reduced to writing and signed by Frank A. Root as such publisher, and the jurat was signed by E. D. Rose as county clerk, but no seal of office or other seal was ever attached thereto.

10. In pursuance of said tax-sale notice the county treasurer offered said land for sale on May 6, 1874, and said quarter-section of land was purchased by John E. Tyler for $51.80. But the purchaser's name, as stated in the tax-sale record made and kept by the county treasurer, and also in the county clerk's duplicate, was and is J. E. Tyler. And the tax-sale book so made by the county treasurer did not and does not show the ownership of said quarter-section of land, nor the person's name to whom assessed, but the column designated in said book for the name of the owner or owners, if known, is left entirely blank, and the duplicate thereof in the office of the county clerk is in all respects the same as said original book made and kept by the county treasurer.

11. At the time of said sale a certificate was issued to said John E. Tyler, in due form, and numbered 145, and afterward he paid taxes on said land, and had the same indorsed on said certificate, as follows: January 10, 1875, for taxes of 1874, $26.10; February 10, 1876, for taxes of 1875, $29.88; January 27, 1877, for taxes of 1876, $20.70; and on May 28, 1877, he indorsed on said certificate the words "Assigned to Charles L. Flint, of Suffolk county, Mass., May 28, 1877." And he then and there signed his name thereto as "John E. Tyler." But said assignment was not and never has been entered on the said county treasurer's sale book, and the clerk's duplicate thereof, nor on either of them; but the column prepared, and designated for the purpose of showing assignments, is left entirely blank, both on said tax-sale book and the duplicate thereof.

12. On December 4, 1876, the county treasurer issued his notice in substance and to the effect that the time for redemption of the lands designated in the schedule attached to the notice, from the sale of May, 1874, for the delinquent taxes of 1873, would expire on May 8, 1877, and if not redeemed on or before said day, then deeds would be issued to the purchasers. Said notice was published December 7, December 14, December 21, and December 28, 1876, and not thereafter. The said quarter-section was described in said notice as "S. E. qr. sec. 35, township 5, range 16," and as being in Jackson county, Kansas, and the amount specified in said notice as due thereon at expiration of redemption was $218.35. But said notice did not state in any manner the name of the person to whom said land was assessed, and neither the name of John Shoup, nor J. Shoup, nor any other name, was set opposite thereto nor used in connection therewith, and it could not be ascertained from said notice who was the owner of said tract of land, nor to whom the same had been assessed, although the name of John Shoup appeared

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on the assessor's roll as the owner of said land at the time of the assessment thereof in 1873, and the name of J. Shoup appeared on the tax roll for 1873 as the owner of said land, and said assessor's roll being at the time of said notice and advertisement in the county clerk's office, and said tax roll being at said time in the county treasurer's office, as public records.

The defects pointed out in the findings we deem mere irregularities or immaterial omissions, and under § 113, ch. 107, Gen. Stat. 1868, (§ 139, ch. 107, p. 967, Comp. Laws 1879,) not sufficient to invalidate the tax proceedings, or the title conveyed by the tax deed. The omission of the official title of the assessor after his signature to the oath as to the correctness of his assessment and valuation of the real estate, and the absence of the official seal of the county clerk to the jurats to the oath of the assessor upon his return, and to the affidavits of the publication of the tax levy und tax sale, are clearly such mere defects as are intended to be covered by the curative act above referred to, that no argument is needed to support our conclusion (Townsen *v.* Wilson, 9 Barr [Penn.], 270.

The only serious question concerning the alleged defects arises over the omission of the name of the person to whom the land was assessed in the notices of sale and redemption. The tax roll shows the assessment in the name of J. Shoup. The statute in force at the time of the publication of the notice of sale provided that the county treasurer should cause to be published for four consecutive weeks prior to the day of sale a list of all lands and town lots subject to sale, describing such land and town lots as the same are described on the tax roll, with an accompanying notice, stating that so much of each tract of land, described in the list, as might be necessary for that purpose, would, on the first Tuesday of May next thereafter, and the next succeeding days, be sold by him at public auction, at his office, for the taxes and charges thereon. (Gen. Stat. 1868, ch. 107, §§ 81, 82.)

The statute relating to redemption notice in force in 1877, and still in force, prescribes: "The county treasurer, at least for months before the expiration of the time limited for redeeming lands as aforesaid, shall cause to be published in some paper published in, or of general circulation in his county, once a week for four successive weeks, a list of all unredeemed land and town lots, describing each tract or lot as the same was described on the tax roll, stating the name of the person to whom assessed, if any, and the amount of taxes charged, and interest, calculated to the last day of redemption, due on each parcel, together with a notice that unless such lands or lots be redeemed on or before the days limited therefor, specifying the same, they will be conveyed to the purchasers." (Gen. Stat. 1868, ch. 107, § 110; Comp. Laws 1879, ch. 107, p. 965, § 137.)

These provisions regarding the description of land by the addi-

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tion of the name of the person to whom assessed, are qualified to some extent by other sections of the statute. Thus § 36, ch. 107, Gen. Stat. 1868, (§ 49, ch. 107, Comp. Laws 1879,) only requires land assessed, or entered upon the assessment roll, to have the name of the owner inserted, when known.

Section 92, Gen. Stat. 1868, (§ 118, ch. 107, Comp. Laws 1879,) provides: "When any lands or town lots are offered for sale for any taxes, it shall not be necessary to sell it as the property of any person, or persons; and no sale of any land or town lot for taxes shall be considered invalid, on account of its having been charged on the roll in any other name than that of the rightful owner; but such land must be in other respects sufficiently described on the tax roll, and the taxes for which it is sold be due and unpaid at the time of such sale."

This section is supplemented by said § 113 of the General Statutes of 1868 (§ 139, Comp. Laws 1879), that "no irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by the tax deed."

From these sections, we deduce these results, that the assessors are expected to ascertain the names of the owners of the lands assessed, and to set opposite each tract or lot on the assessment roll the name of the owner; but when the assessor, having jurisdiction, and proceeding irregularly in the exercise of it, fails to enter any name, or enters another name than that of the rightful owner, the assessment is not a nullity; further, that a tax sale is not invalid, if the land is sold as the property of a person other than the true owner, or if sold without regard to ownership; and, finally that as in the assessment roll and in the tax sale the name of the owner of the land is not essential to the validity of the proceedings, the name of such owner, or the name of the person to whom land is assessed, is not absolutely essential to the sale and redemption notices; therefore its omission is only an irregularity. Clearly, section 92 renders the omission in the tax-sale notice a matter of form, if the description is otherwise sufficient; and if the name is omitted in all the assessment and sale proceedings, without injurious effect, it is hardly reasonable to hold, that failure to insert such name in the redemption notices renders the tax deed void, because the officer giving such notice can only obtain such name from the assessment or tax books. If it is not there (and some of the sections quoted were evidently adopted upon the theory that the assessor might not always be able to ascertain the owner—that he might assess the land to the wrong person, or by mistake or neglect omit it altogether), no name can be inserted in the redemption notice.

An examination of the cases in the Illinois and New York reports, to which our attention has been called by counsel, does not change our opinion. In the former state, the duty of giving notice

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devolves upon the tax purchaser, before he is entitled to his deed, by a provision of the state constitution. Of course, under such a constitutional direction, a strict compliance with all the obligations devolving upon the tax purchaser is requisite to render a tax deed valid. In New York, the statutes are different in many respects from ours, and we fail to find any curative act in force in that state like § 139, ch. 107, Comp. Laws 1879. In Wisconsin, the supreme court hold the redemption notice is merely directory, and its total omission not effective against the tax purchaser. (Robinson *v.* Howe, 13 Wis. 341; Wright *v.* Sperry, 21 Wis. 331; Wright *v.* Sperry, 25 Wis. 617.) We do not go so far. The writer is of the opinion that the failure to comply with the substantial requirements of the redemption notice would be fatal to a tax deed; that this notice, though subsequent in point of time to the tax sale is, nevertheless, regarded in judgment of law as precedent to the acquisition of the title. (Blackwell on Tax Titles, [4th ed.,] 343, 344.) But it is unnecessary to pursue this line of discussion. In this case, the notice was not wholly omitted; in the notice occurred only an omission or irregularity, which, under the statute, was not of the substance of the notice, and therefore not fatal.

Counsel for defendant in error suggest toward the close of their argument that, as many errors and fatal omissions in the tax proceedings might have been shown in the court below, this court ought to sustain the judgment of the trial court as to the invalidity of the tax deed, upon the well-settled principle of law, that error will never be presumed, and that everything necessary to support the conclusion of law that the tax deed is null and void will be considered as having been found by the court in its general judgment. Counsel are here in error, in view of the condition of the record. All the parties requested the court to make special findings of fact; such findings were made; the court, among other findings, found that the tax deed was in due form; then certain defects or omissions in the tax proceedings are set forth at length; the conclusions of law are presumed to be based upon the special findings of fact and the general judgment follows the conclusion of law. As the tax deed is prima facie evidence of the regularity of all proceedings, from the valuation of the land by the assessor, inclusive, up to the execution of such deed, the only defects or omissions we can consider or suppose were proved, are those contained in the special findings. Those defects or omissions are not sufficient to destroy the deed. All the interests and title possessed by John Shoup under the deed were transferred and conveyed to Phillipi. The first, second and third conclusions of law, being inconsistent with the special findings, must fall; and as the general judgment is based upon those conclusions, it also must fall. The third conclusion of fact, not being as full and definite as the admissions of the parties on which it was founded, and having been duly excepted

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to by the plaintiffs in error, and we being in doubt as to ordering a final judgment in their favor in the absence of the important admission of the parties (contained in the bill of exceptions), from the special findings of fact, feel compelled to remand the case for a new trial. If no other defects or omissions are shown in the tax proceedings on another hearing than those pointed out in the special findings of fact, the tax deed cannot be decreed void by reason of the defective and insufficient execution of the prerequisites thereto.

The judgment of the district court will be reversed, and the case remanded with direction to proceed in accordance with the views herein expressed.

All the Justices concurring.

THE CHICAGO AND IOWA R. R. Co. et al.

v.

ISAAC M. MALLORY et al.

(*Advance Sheets*, 101, *Illinois Reports*. *Nov.* 10, 1881—*Rehearing denied March Term*, 1882.)

In a suit by a railroad company to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company to show affirmatively that the issue of the bonds was authorized by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution, and the law under which the election is held must be substantially complied with, or the election will confer no authority.

Where a law for an election to determine whether a subscription, etc., shall be made by a town to aid a railroad corporation, provides that "such election shall be held and conducted, and returns thereof made, as is provided by the Township Organization law in towns organized under said law," an election held on the question, as in the case of an ordinary town meeting, presided over by one moderator only, with only one clerk, is void, and will confer no authority to issue the bonds of the town. Such a provision requires the election to be held by three judges and two clerks, as in general elections. The words "town meeting," and the word "election," as used in the Township Organization law, are not convertible terms.

The words "town meeting" have a definite and well settled meaning in the Township law, and are always used to describe the annual town meetings of the electors of the town for the purpose of electing town officers, and transacting such other business as the electors are authorized to transact, or special meetings of the electors for such purposes called pursuant to law. Such meetings are clearly distinguishable from "elections," when there is no other business transacted but to elect officers.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Stephenson county; the Hon. William Brown, Judge, presiding.

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Bill was filed in the circuit court of Ogle county, by Isaac M. Mallory, Daniel Shockley, and Samuel L. Bailey, tax-payers of the town of Flagg, in Ogle county, against the Chicago and Iowa R. R. Co., and certain officers of said town of Flagg, to enjoin the issuing to the Chicago and Iowa R. R. Co. of $50,000 of the bonds of the town, payable ten years after date, and bearing interest at the rate of ten per cent per annum, etc., as a donation to the railroad company. By an amendment made subsequent to the filing of the bill, the Chicago and Northwestern Ry. Co., as a tax-payer of the town, was made a co-complainant, and W. H. Holcomb, receiver of the Chicago and Iowa R. R. Co., was made defendant.

Answer having been filed by the Chicago and Iowa R. R. Co., that company and its receiver filed its cross-bill, praying that the bonds sought to be enjoined be issued. Answers and replications were filed, properly presenting issues on the allegations of the original and cross-bills.

On the hearing, the cross-bill was dismissed, and the prayer of the original bill granted. An appeal was prosecuted from that decree to the Appellate Court for the Second District, where, on hearing, the decree of the circuit court was affirmed, and from that judgment this appeal is prosecuted.

Mr. Geo. W. Cothran, and Mr. Geo. W. Kretzinger, for the appellants, insisted that the charter of the railroad company controlled in all matters concerning the election, and that all its provisions in that regard had been complied with.

Mr. B. C. Cook, for the appellee, the town of Flagg:

1. The burden of proof to show that the donation was authorized by a vote of the people of the town of Flagg, under existing laws before the adoption of the constitution, rests wholly on appellants. Wright *v.* Bishop, 88 Ill. 303; Middleport *v.* Ætna Life Ins. Co., 82 id. 568; Jackson County *v.* Brush et al., 77 id. 65; Springfield and Illinois Southeastern Ry. Co. *v.* Coldspring Township, 72 id. 603; Schall et al. *v.* Bowman et al., 62 id. 321; People *v.* Jackson County, 92 id. 450.

2. The law under which it is claimed that an election was held, did not provide for submitting the question at a town meeting, but at a regular election. Secs. 56 and 68, Township law; People *v.* Town of Laenna, 67 Ill. 65; People *v.* Town of Santa Anna, 68 id. 28; Lippincott *v.* Town of Pana, 92 id. 24.

3. No bonds, such as are claimed, were ever voted by the town. The voters of the town had the right to prescribe the conditions upon which the donation should be made, and the bonds issued. People *v.* Cass County, 77 Ill. 440; Jackson County *v.* Brush et al. 77 id. 63; People *v.* Glann et al., 70 id. 234; People *v.* Dutcher, 56 id. 145; People *v.* Chapman, 66 id. 138; Ramsey *v.* Hoeger, 76 id. 444.

4. The burden of proof is upon the party alleging the validity

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of the election, to show affirmatively that the vote was legal. Supervisors of Jackson County *v.* Brush, 77 Ill. 59; Town, etc., *v.* Ins. Co., 82 id. 562; People *v.* Board of Supervisors, 92 id., 450, and authorities cited on the first point.

5. The Township law referred to in the charter provides that all elections held under it, except certain specified ones, of which this election was not one, shall be holden in the manner provided by the general Election law of the State. This is precisely equivalent to a direct provision in the charter that the election shall be holden in the manner provided in the general Election law, and brings the case directly within the cases of Lippincott *v.* Town of Pana, 92 Ill. 24, and People *v.* Town of Santa Anna, 68 id. 28.

6. Under the Township law no returns are required to be made of the votes for the election of town officers. It only requires a canvass of the votes. Sec. 67, Township law.

Mr. Justice Scholfield delivered the opinion of the Court:

Agreeing, as we do, with the view entertained of this case by the lower courts, it will be necessary to notice but a single question.

The burden is upon the railroad company asking the enforcement of the issuing of the bonds, to show, affirmatively, that the bonds are authorized to be issued by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution, (Wright *v.* Bishop, 88 Ill. 303, Middleport *v.* Ætna Life Ins. Co., 82 id. 568, People *v.* Jackson County, 92 id. 453,) and the law under which the election is held must be substantially complied with, or the election will confer no authority; and so it has been ruled, an election held and conducted as a special town meeting, under a law requiring the election to be held and conducted, and returns thereof to be made as in general elections, will be a nullity, and confer no power to issue bonds of the town. Lippincott *v.* Town of Pana et al., 92 Ill. 24; People ex rel. *v.* Town of Santa Anna, 67 id. 57; People ex rel *v.* Town of Laenna, id. 65.

What is here claimed to have been an election authorizing the issuing of the bonds, was but a special town meeting, presided over by a moderator, and without the judges or clerks required in general elections. The question is, whether this is such an election as is authorized by the charter of the Chicago and Iowa R. R. Co., under the authority of which it is claimed to have been held.

The twelfth section of the charter of that company, (vol. 2, p. 163, Private Laws of 1869,) in providing for the holding of an election to determine whether subscriptions, donations, etc., shall be made by the town, employs this language: "And such election shall be held and conducted, and returns thereof made, as is provided by the Township Organization law, in towns organized under said law." Now, it will be noted, the election is not to be held and

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conducted and returns thereof made, as the law requires in case of township elections, or at the election of township officers. If this had been the requirement, there would have been no room whatever for controversy, and it would seem of significance that this idea is not expressed. Had it been intended, why not have so said? But the language is general, and requires the election to be held and returns thereof made as is "provided by the Township Organization law." A particular kind of election is not designated as furnishing the guide, but a particular law. What, then, is "provided by the Township Organization law" on that subject? It provides for town meetings, in which township officers are to be elected, and to be presided over by a moderator, who, in addition to discharging the duties of presiding officer over the town meeting, "shall have the same power, and be subjected to the same penalties, as other judges of election." Rev. Stat. 1874, chap. 139, title "Township Organization," secs. 1, 2, 3, 4, 7, 8, 9, 10, art. 6, and secs. 1, 2 and 3, art. 7. It is also provided by statute that "each town shall constitute an election precinct, but the county board may divide any town into as many election districts as the convenience of the people may require, . . . and may, from time to time designate the places at which elections shall be held. All general and special elections shall be held at the places so designated." Rev. Stat. 1874, chap. 46, title "Elections," sec. 31. And sec. 6, art. 6, of the Township Organization law, supra, provides that "the supervisor, assessor and collector of the town shall be ex-officio judges of all elections in their town, except as otherwise provided by law." There is no reason, of which we have any conception, why this section can be held to be not embraced by the language of the charter quoted supra, namely: "provided by the Township Organization law." It is provided by, for it is a part of, the Township Organization law. It enacts a general rule, and whether any election is embraced by it, depends upon whether the law under which it is held provides for other or different judges, and no other or different judges being provided for by the railroad charter, those designated must act.

But counsel insist this election must, in all respects, be conducted as a town meeting, and, therefore, must have had a moderator only. The force of this is not perceived. It might have been very appropriate to have so enacted, but the General Assembly was at liberty to enact as it pleased, and if it chose, as a safeguard to the tax-payers, to interpose an election with the restraints and guarantees thrown around general elections, instead of a town meeting, no one has a right to complain. The question is not one of propriety, but one of construction,—what was enacted. The words "town meeting" have a definite and well-settled meaning in the Township law, and are uniformly used to describe the annual meetings of the electors of the town for the purpose of electing township officers, and transacting such business as the electors are

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by law authorized to transact, or special meetings of the electors for such purposes, called pursuant to law. The statute speaks of elections being held at or in such meetings, but never describes them by the word "election." Thus, in sec. 1, art. 6: "The annual town meeting, in the respective towns, for the election of town officers, and the transaction of the business of the town, shall be held," etc. In sec. 3, art. 6: "Each town, for the purpose of town meetings, constitutes an election precinct." Secs. 2 and 5, art. 6, speak of the notices to be given for the holding of town meetings, and of the mode of changing the places for holding town meetings, the latter providing that that question may be included in the notices of such meeting, and "the electors may vote for and against," etc. Sec. 7, art. 6, provides how special town meetings may be called, and secs. 8 and 9 of the same article provide for notice of special town meetings, and what it shall contain, and sec. 10 provides that the "electors at a special town meeting, when convened, shall have power, among other things, to fill vacancies in the offices of the town." Sec. 1, art. 7, provides that "at the annual town meeting in each town there shall be elected, by ballot," certain town officers. Sec. 2 of the same article provides how regular and special town meetings may be called to order, and a moderator thereof elected, and this officer is uniformly styled and spoken of as "moderator of the town meeting." In sec. 5 of the same article the town clerk is made clerk of the town meeting, and in sec. 10 of the same article, the canvass of the votes being made, "the result shall be publicly read by the clerk to the meeting."

On the other hand, we know of no instance in which the word "election" alone, unaccompanied by any qualifying words pointing out its connection with a town meeting, is used to describe what is in reality a town meeting. The General Assembly must be presumed, in the enactment of the charter of the Chicago and Iowa R. R. Co., to have been mindful of this use of these terms, and to have employed language in the same sense; yet the words "town meeting" do not occur in that charter. The petition to be presented to the town clerk is not for a "town meeting," but for "an election to be held," etc. The notices to be posted are not, as in the cases of special town meetings, to be of "special town meetings," but of "an election to be held by the legal voters," and whenever mention is made of taking the vote of the electors, it is called an "election." It cannot be said the words "town meeting," as used in the Township law, and the word "election," are convertible terms. There may, it is true, at a town meeting be nothing but an election, but there may be more. The theory of such a meeting is, that the corporate body of the town is present for the purpose of transacting, and competent to transact, all the corporate business of the town not specially delegated to certain individual officers, and, but for the statute requiring officers to be selected by ballot, this would manifestly all be done in open meet-

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ing, by resolution, or whatever other method would be agreed upon to ascertain the will of the majority.

Again, by section 8, art. 7, of the Township Organization law, supra, "no registration of voters shall be required for the purposes of a town meeting." The meeting is held with open doors. All the electors so desiring are present, and each elector has an opportunity for detecting and exposing and prohibiting the participation of those not lawfully entitled to take part in the proceedings. But in case of general elections this is not so. The judges of those elections are authorized to allow not more than two legal voters, as challengers, of each party, in the room where the election is held. The elector, as a rule, casts his ballot and goes away. In a great measure the responsibility of detecting imposition and fraud is left with the judges of elections; but to enable them to protect the purity of the ballot-box, certain restrictions are imposed upon those seeking to exercise the elective franchise, among which is that of registration. And a circumstance, as we think, strongly confirmatory of the view that it was intended an election, and not a town meeting, was to be held under the charter, is, that the charter, in its 13th section, expressly provides "the qualification of the electors at said election shall be determined by the registration next preceding said election." It is impossible the Registry law can be complied with at a town meeting. It requires (sec. 7, chap. 46, p. 470, Rev. Stat. 1874,) one of the registry lists to be delivered to the judges or inspectors, and one to be filed in the office of the town clerk, etc., and then provides that "it shall be the duty of said judges or inspectors so receiving such list carefully to preserve the said list for their use on election day, and to designate two of their number, at the opening of the polls, to check the name of every voter voting in such district whose name is on the register." And section 9 of the same act makes provision for the depositing and keeping of these lists after the election. The only difference between this and any other election, as respects the registry is, obviously, here the judges use the old registry lists, while in the others they use lists specially prepared for the occasion. In all other respects the duties of the officers are the same.

It is said this provision in section 13 was unnecessary, and therefore meaningless, because it was already provided in the Township law that there need be no registry. Its necessity was a question for the General Assembly. It is very clear in its language, and by no fair rule of construction can it be held to be identical in meaning with the Township law on that subject. The distinction is between using an old registry list and using none at all. The Township law requires no list; the charter requires a list, but it is the old one.

We think the court below ruled correctly. Its decree will, therefore, be affirmed.

Decree affirmed.

See note, p. 241.

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JAMES U. OGDEN

v.

THE COUNTY OF DAVIESS.

(*Advance Case, U. S. Supreme Court.*)

The act of Missouri of January 4, 1860, authorizing the inhabitants of a certain "strip of country" to subscribe to the stock of a railroad passing through it, and to levy a tax to pay the subscription, does not authorize the issuing of bonds to pay such subscription by so anticipating the tax.

Neither the act of March 8, 1868, amended March 24, 1870, authorizing "municipal townships" to pay former subscriptions to railroad stock in bonds, nor the act of March 24, 1868, authorizing "counties, cities, and towns" to do the same, authorizes the issue of the above-mentioned bonds, as these acts apply only to such public corporations as entireties, and not to a "strip of country" containing the aggregation of many parts of such townships, etc.

The issue of such bonds being wholly unauthorized, and ultra vires, they are void even in the hands of a bona-fide holder.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

J. E. Merryman, for plaintiff in error.

B. H. Bristow and W. S. Opdyke, for parties collaterally interested.

Willard P. Hall, for defendant in error.

WAITE, C. J.—On the 4th of January, 1860, the General Assembly of Missouri incorporated the Platte City and Des Moines R. R. Co., now, by statutory change of name, the Chicago and Southwestern Ry. Co. Section 7 of the charter is as follows:

"SECTION 7. Upon the presentation of a petition of the president and directors of said company to the County Court of any county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road, that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, it shall be the duty of said County Court to order an election therein, and shall prescribe the time, place, and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company."

On the 4th of July, 1865, a new Constitution of Missouri went into effect, section 14, article 11, of which is as follows: "The General Assembly shall not authorize any county, city, or town to

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become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

By an act to facilitate the construction of railroads, passed March 23, 1868, municipal townships in any county of Missouri were authorized to subscribe, through the County Court of the county, to the stock of railroad companies, with the assent of two-thirds the qualified voters of the township, and to pay their subscriptions with bonds in the name of the county, payable out of a special tax to be levied on the real estate of the township. On the 24th of March, 1870, the General Assembly amended this law by adding the following as section 7: "In all cases where, by the provisions of the charter of any railroad company organized under the laws of this State, the taxable inhabitants of a portion of a municipal township of any county in this State have voted, or may hereafter vote, to take stock in such railroad company, they are hereby declared entitled to and shall have all the privileges, rights, and benefits in said act conferred upon counties or townships; and the County Court of such county shall exercise the same powers and perform the same duties in issuing the bonds, levying, collecting, and paying over the taxes which it is required to in the case of a county or township under the provisions of said act: Provided, however, that no part of such township outside the limits of the district voting shall be taxed to pay any of the bonds or coupons so issued by the County Court. This act shall take effect from its passage." After the passage of this act, the Daviess County Court, on the petition of the Chicago and Southwestern Ry. Co., ordered an election on the 21st day of June, 1870, to obtain the assent of the "taxable inhabitants living within a strip of five miles on each side of the line of said railway to be built through the county of Daviess, . . . to the subscription by the county of Daviess, for and on behalf of the taxable inhabitants of said strip, of the sum of sixty thousand dollars of the capital stock of said railway company, on such terms and conditions as the court should deem proper." Thereupon the court fixed, as one of the conditions of the subscription, that "in payment of said subscription sixty bonds shall be issued by said county to the Chicago and Southwestern Ry. Co., . . . of one thousand dollars each, payable ten years after date, with interest at the rate of eight per cent. per annum, evidenced by semi-annual coupons," etc., etc. The election was held, and resulted in 568 votes for the subscription and 400 against it. The County Court subscribed the stock, and to pay the subscription issued and delivered to the company bonds in the following form:

"UNITED STATES OF AMERICA.

"$1,000.] State of Missouri, County of Daviess. [$1,000.

"Daviess County Ten-Year Bond, No. 3.

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"Know all men by these presents: That the county of Daviess, in the State of Missouri, acknowledges itself to owe and be indebted to, and promises to pay the bearer the sum of $1,000 on the 1st day of August, in the year of our Lord one thousand eight hundred and eighty, for value received, negotiable and payable without defalcation or discount at the Metropolitan National Bank, in the city and State of New York, with interest thereon from the 1st day of August, A. D. 1870, at the rate of eight per centum per annum until paid, which interest shall be due and payable semi-annually on the 1st day of February and August in each year, on the presentation of the proper interest coupon, as annexed hereto, attested by the signature of William M. Bostaph, clerk at the said Metropolitan National Bank. This is one of sixty bonds of like date, amount, and effect, numbered from one to sixty, both numbers inclusive, issued in payment of the indebtedness of said county of Daviess to the Chicago and Southwestern Ry. Co., incurred on account of an election held in said county on the 21st day of June, A. D. 1870, by certain taxable inhabitants of said county.

"In testimony whereof, the said county of Daviess, by order of its County Court, has caused these presents to be executed by the signature of the presiding justice of said court, attested by the clerk thereof, with the seal of said county affixed, at office in Gallatin, Daviess county, Missouri, this 27th day of July, A. D. 1870.

"PETER BEAR,
"Presiding Justice.

"Attest: WILLIAM M. BOSTAPH, Clerk."
[Seal of Daviess County Court, Mo.]

COUPON DESCRIBED IN AMENDED PETITION.

The coupon is in words and figures following, to wit:

"$40. GALLATIN, Mo., July 27, 1870.

"County of Daviess, in the State of Missouri, will pay to the bearer $40 on the 1st day of February, 1873, at the Metropolitan National Bank, in the city and State of New York, for value received, being the semi-annual interest due on bond No. 3. of said county, issued to Chicago and Southwestern R. R. Co.

"WILLIAM M. BOSTAPH, Clerk."

When the delivery of the bonds was made, the interest coupons were cancelled to September 1, 1871. The coupons for 1873 were not paid, and this suit was brought to recover what was due on that account. The plaintiff is a bona-fide holder of the coupons. On the trial the judges of the Circuit Court were divided in opinion on several questions which have been certified here, the principal of which is whether there was lawful authority for the issue of the bonds. The presiding judge being of the opinion that there was not, judgment was given in favor of the county, and to reverse that judgment this writ of error was brought.

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We think the presiding judge was right in the view he took of the controlling question in this case. Without doubt, section 7 of the charter of the company authorized the taxable inhabitants of the "strip of country" designated to vote a tax upon themselves to take stock, and required the County Court to levy and collect such a tax if voted, and pay over the money as fast as collected to the treasurer of the company; but in this we find no authority for the county to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond, and all the County Court could do was to collect and pay over the tax they voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so by the County Court, but that was all. The effect of their vote was nothing more than to authorize the County Court to levy, collect, and pay over to the treasurer of the company the special tax they had determined upon. The requirement of the law that the money, when collected, should be paid over to the treasurer of the company, is entirely inconsistent with any idea that the obligations to be met in this way were to be in the form of negotiable paper afloat on the market as commercial securities. Under the provisions of section 6 of the charter, counties, towns and cities were expressly authorized to issue bonds in payment of their subscriptions. The omission of any such power in section 7 is conclusive evidence that nothing of the kind was intended in case of "strip" subscriptions. In this particular the case is even stronger than that of Wells *v.* Pontotoc County, ante, p. 196, decided at the present term.

Neither did the act of March 24, 1870, give the power to issue bonds. That was an act amending what is commonly known as the "township aid law" of Missouri, which related only to subscriptions by municipal townships. The amendment granted no new power of subscription, but simply provided that where, under the charter of any railroad company, the taxable inhabitants of a portion of a municipal township had voted or might vote to take stock in the company, the County Court might issue bonds for the stock so taken, to be paid out of taxes levied on property within the limits of the district voting. In the charter of the Chicago and Southwestern Co., authority was not given the taxable inhabitants of any portion of a township to take stock, but to the taxable inhabitants of any strip of country through which the road might pass, not exceeding ten miles on either side. The strip was not necessarily part of a township. It might include parts of several townships, or the whole of some and parts of others. As the act amended related entirely to municipal townships as such, and there had before been legislation in relation to strips of country without any reference to townships, it must be presumed that the amendment applied only to parts of townships separately,

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and not to the aggregation of townships or parts of townships which would almost necessarily be included in a strip of country twenty miles wide, or under, along a railroad as it runs through a county. The bonds which this statute authorizes were to be issued on behalf of a portion of a township, not on behalf of a "strip of country." Under the charter the taxable inhabitants of the strip were to take the stock, and they were to be taxed. We cannot, without a perversion of language, apply the act of 1870 to this provision of this charter. It follows that neither in the charter nor in the amending act relied on can there be found authority to issue the bonds in question.

On the 24th of March, 1868, the General Assembly of Missouri passed an act "to enable counties, cities, and incorporated towns to fund their respective debts." Section 1 of that act is as follows:

"That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities, or towns in this State which have or shall hereafter subscribe to the capital stock of any railroad company, may, in payment of such subscription, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof."

It is claimed that authority for the issue of the bonds can be found in this law. We do not agree to this. Neither the county, nor a city, nor a town took the stock now in question. The county did not owe any debt. The taxable inhabitants of the "strip of country" had authority to vote to tax themselves for the stock. In this way they could bind themselves, but that did not create a debt of the county, as such, for which funding bonds might be issued. The debt, if any, was of the "strip" only, and not the county. As no bond could be issued under the original vote, the county assumed no obligation whatever. The County Court and other officers of the county could be compelled to levy, collect, and pay over the tax, but that was all the county or its officers were required to do.

We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond. On the face of these bonds it appears that they were issued to the Chicago and Southwestern Co., on account of an election held by "certain taxable inhabitants of the county." This clearly connects the bonds with the Chicago and Southwestern charter, and indicates unmistakably that they were put out on account of a "strip" subscription. The holder is, there-

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fore, chargeable with notice of the want of legal authority for their issue.

The principal question certified is answered in the negative, and, without specially replying to the other further than may be implied from this opinion, the judgment is affirmed.

ANSWERED IN NEGATIVE AND AFFIRMED.

See note, p. 241.

JOHN S. CAGWIN, Respondent,

v.

THE TOWN OF HANCOCK, Appellant.

(84 *New York Reports*, 532.)

The jurisdiction of quasi judicial officers to make a decision in any case is always open to inquiry, and the decision may be attacked collaterally for want of jurisdiction.

There can be no bona fide holder of town bonds within the meaning of the law applicable to negotiable paper, as they can only be issued by virtue of special authority conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute.

All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, must see to it that its provisions were complied with; and in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith, does not preclude the town from showing that they were illegally issued.

The decisions of the Federal courts holding a contrary doctrine held not to be controlling.

Under the provisions of the act of 1866 (§ 2, chap. 898, Laws of 1866) authorizing certain towns to subscribe for the stock of the N. Y. and O. M. R. R. Co., and to issue bonds for moneys borrowed to pay therefor, provided the consent in writing of a majority of the tax-payers, owning more than one-half of the taxable property of the town shall first have been obtained, and provided that the fact that such majority has been obtained, "shall be proved by affidavit, in writing," of one of certain specified town officers, and declaring that such affidavit "or a certified copy thereof shall be evidence of the facts therein contained," the affidavit is not conclusive but only prima facie evidence of the facts and may be disputed.

Accordingly held, in an action to recover the amount due upon certain interest coupons cut from bonds issued by railroad commissioners appointed for defendant under said act, and which had been purchased for value and in good faith, that defendant was not precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the tax-payers of the town had not been obtained.

People *v.* Mitchell (35 N. Y. 551), Bank of Rome *v.* Village of Rome (19 id. 20), distinguished.

Cagwin *v.* Town of Hancock (22 Hun, 201), reversed.

(Argued March 7, 1881; decided March 15, 1881.)

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APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 24, 1880, a reversing a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 22 Hun, 201.)

The nature of the action and the material facts appear in the opinion.

Wm. Gleason for appellant. The towns of this State have no power to bond for railroads unless it has been expressly conferred by statute. (Town of South Ottawa *v.* Perkins, 4 Otto, 258, 266; id. 429; 13 Wall. 304; 3 id. 327; Wiesmer *v.* The Village of Douglas, 64 N. Y. 92; Starin *v.* The Town of Genoa, 23 N. Y. 439; Gould *v.* The Town of Sterling, 23 N. Y. 440, 462; People *v.* Mitchell, 35 id. 551; Donnelly *v.* The Town of Ossining, 18 Hun, 352; 1 R. S. 337, § 2.) Where there has been no authority to issue bonds, they can never have any legal inception, and there can be no bona fide holder of them in whose hands they can be valid. (Town of Venice *v.* Woodruff, 62 N. Y. 465; The Township of Oakland *v.* Skinner, 4 Otto, 255; Town of South Ottawa *v.* Perkins, id. 258, 260; id. 269; Horton *v.* Town of Thompson, 71 N. Y. 513, 521; Weismer *v.* Village of Douglas, 64 id. 92; Starin *v.* Town of Genoa, 23 id. 439, 456; People *v.* Mead, 24 id. 114; S. C., 36 id. 224; People *v.* Smith, 45 id. 773; People *v.* Knowles, 47 id. 415, 419; People *v.* Spencer, 55 id. 1; Town of Venice *v.* Woodruff, 62 id. 465; Town of Springport *v.* Bank, 75 id. 397; Buchanan *v.* City of Litchfield, U. S. Court, Nov. 22, 1880; 22 Alb. L. J. 516; Dodge *v.* County of Platte, 82 N. Y. 218; 76 id. 185; 78 id. 362–367; 79 id. 171; Falconer *v.* The Buffalo and Jamestown R. R. Co., 69 id. 491, 497; 45 id. 772; 46 id. 110; 71 id. 309; 55 id. 1; Angel *v.* Town of Hume, 17 Hun, 374–384.) The affidavit of the assessors in no wise estopped the town from showing that the requisite consents were not given by a majority of the tax-payers, nor for a major part of the property on the roll. (Scipio *v.* Wright, 11 Otto, 665, 667, 675; 75 N. Y. 406; 23 id. 464.) Neither the affidavit of an assessor, or town or county clerk is a judgment, nor is the issuing of the bonds a judgment binding the town. (4 N. Y. 515, 518, 522; People *v.* Batcheller, 53 id. 128; Stewart *v.* Palmer, 74 id. 183–188, 189, 190, 191–196.) Purchasers of the bonds were chargeable with notice of the statute under which they were issued, and were bound to see to it that its provisions were complied with. (Peck *v.* Burr, 10 N. Y. 299; Stafford *v.* Williams, 12 Barr, 240–243; Donovan *v.* The Mayor, etc., of N. Y., 33 N. Y. 291, 292; McDonald *v.* Mayor, etc., 68 id. 23; 2 Den. 110; 33 N. Y. 293; 1 Den. 510; 8 Allen, 109.) Where any court or officer has acted without jurisdiction the acts are void, and no appeal or certiorari is necessary to get rid of them, but whoever acts thereunder is a trespasser. (Van Rensselaer *v.* Witbeck, 7 N. Y. 517; Mygatt *v.* Washburn, 15 id. 316; Whitney *v.* Thomas, 23 id. 281; Cruger *v.*

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Dougherty, 43 id. 107, 121; Overing *v.* Foote, 65 id. 263; Hallock *v.* Rumsey, 29 S. C. 89–91; People *v.* Van Slyck, 4 Cow. 297, 316; People *v.* Cook, 8 N. Y. 67.)

W. J. Welsh for respondent. The consents in writing filed and recorded have been made, by statute, the record evidence upon which officers were authorized to act, and cannot be impeached by parol evidence in a collateral proceeding. (Pierce *v.* Wright, 45 How. 6; 2 Stark. 544 [5th Am. ed.]; People *v.* Zest, 23 N. Y. 140; Pierce *v.* Wright, 45 How. 6.) The defendant is concluded by the affidavit of the assessors, and cannot in this action question the sufficiency of the consents to bond. (Bank of Rome *v.* The Village of Rome, 19 N. Y. 24; Com'rs of Knox County *v.* Aspinwall, 21 How. [U. S.] 546; Shell *v.* Telfore, 4 N. Y. Legal Observer, 307; Com'rs of Douglas County *v.* Boles, 4 Otto, 109; Howland *v.* Eldridge, 43 N. Y. 460; 1 Whart. on Ev. [2d ed.], § 1; Pierce *v.* Wright, 45 How. 7; People *v.* Mitchell, 35 N. Y. 552; Bk. of Rome *v.* The Village of Rome, 19 id. 22; Town of Colma *v.* Eaves, 2 Otto, 484, 487; Thompson *v.* Lee County, 3 Wall. 327; Town of Venice *v.* Murdock, 2 Otto, 498; 4 id. 205; Block *v.* Commissioners, 9 id. 686; People ex rel. Town of Rochester *v.* Deyoe, 2 N. Y. S. C. [T. & C.] 146.)

Earl, J.—This action was brought to recover the amount due upon certain interest coupons, which had been cut from bonds issued by the railroad commissioners appointed for the defendant under the act, chapter 398, of the Laws of 1866, entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof," and the several acts amendatory thereof. Claiming authority under the acts referred to, the railroad commissioners in 1871 subscribed for $100,000 of the stock of the New York and Oswego Midland Railroad Company, and in the years 1871 and 1872 issued bonds of the defendant to pay for such stock. The bonds were delivered by them, upon the orders of the railroad company to one Culver, who was a contractor engaged in building the railroad, and who had no knowledge when he received the bonds that the defendant made any question as to their validity or legality. He afterwards sold all the bonds to divers persons. William Gilman purchased some of them in good faith and for full value, and he cut off the coupons and sold them to the plaintiff for their full value. The defendant defended this action upon the ground mainly that a majority of the tax-payers of the town, owning or representing more than one-half of the taxable property, did not consent in writing to the bonding of the town as required by the acts. The referee sustained this defence. But upon appeal by the plaintiff to the General Term, his decision was reversed, and it was there held that the affidavit of the assessor, stating that the re-

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quisite number of tax-payers had consented to bonding the town, was, in favor of the plaintiff, a bona fide holder of the coupons, conclusive upon the town, and precluded proof that they had not in fact consented.

The referee found, as a matter of fact, that the requisite number of tax-payers had not consented to bonding the town; and as his finding was not disturbed by the General Term, it is not now disputed that it concludes us. The main inquiry here, then, is as to the conclusive nature of the affidavit of the assessors; and that inquiry involves an examination of the acts of the legislature relating to the subject.

Section 1 of the act of 1866 provides that, upon the application of twelve or more freeholders of any town, the county judge or the Supreme Court may appoint the railroad commissioners. Section 2 provides that it shall be lawful for the commissioners to borrow on the credit of the town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing, not exceeding in amount thirty per cent. of the assessed valuation of the real and personal property of the town, as shown by the assessment roll, and to execute bonds for the sum so borrowed, providing, however, that the consent shall first be obtained in writing of a majority of the tax-payers of such town, owning or representing more than one-half the taxable property of the town assessed and appearing upon the assessment-roll, which consent shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged. It is further provided that the fact that a majority of the tax payers representing a majority of the taxable property has been obtained and acknowledged, "shall be proved by the affidavit in writing" of one of the assessors of the town, or of the town clerk, or county clerk, which shall be indorsed upon or annexed to the written consent, and the consent and affidavit shall be filed in the town clerk's office of the town, and a copy thereof in the county clerk's office of the county; and that "the same, or a certified copy thereof, shall be evidence of the facts therein contained, and shall be admitted in evidence, in any court in this State and before any judge or justice thereof; and it shall be the duty of the said assessors and town and county clerks to make such affidavit when said consent shall have been obtained as provided in this section."

It will thus be seen that the commissioners had no power to issue any bonds until the requisite consent of the tax-payers had been obtained. That was made a fundamental condition of their action, and it was the manifest intention of the legislature that the bonds should not be issued without such consent.

After the consents had been obtained the section imposed a duty upon the assessors, town clerk and county clerk. That duty did not arise until the requisite number of consents had been obtained.

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They had no right to act and could not be compelled to act before. They were required to make the affidavit, in the language of the act, "when the said consent shall have been obtained as provided in this section." There was nothing in the act expressly imposing upon them the duty of inquiring to ascertain whether the requisite consents had been obtained, or to make any adjudication upon that subject; but such a duty may be implied. They had no right to call and examine witnesses, and there was nothing really resembling a judicial inquiry to be made by them. They were to take the consents and compare the names on them with the names on the assessment-roll of the town, and thus, with perhaps such other information as they could obtain, determine whether the requisite number of tax-payers had consented. They were to swear no witnesses, conduct no judicial inquiry under the sanction of oaths, and render no formal judgment. If they believed the requisite number of the tax-payers had consented, they were to make the affidavit. They had no greater facilities for reaching the truth in the matter than any other citizens. It cannot be supposed that the legislature intended that a single assessor, without hearing any parties, without the aid of sworn witnesses, and usually without legal skill or knowledge, should conclusively determine the puzzling questions of facts, and the difficult and perplexing questions of law, which frequently attend upon an inquiry as to whether the requisite consents of tax-payers have been obtained, and that he should thus, by his simple ex parte affidavit, conclusively bind the town to the limit of thirty per cent of all the taxable property therein. If it had been intended to give such dangerous and extraordinary force to such an affidavit, we may suppose that the intention would have been plainly expressed in the statute, and that it would not have been left to inference. A contrary intention is evinced in the explicit and emphatic manner in which the requirement of the consent of the majority is placed in the acts. In the act, chapter 61 of the Laws of 1868, entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to amend the several acts in relation thereto," this intention is plainly manifested. In section 1 it is provided, that in every case where consent in writing shall have been obtained of the "majority of the tax-payers appearing upon the assessment-roll of any town for the years 1865 or 1866 to the borrowing of money on the faith and credit of the town, etc., and when such tax-payers shall own or represent more than one-half of the taxable property, such consents shall be valid and effectual and shall not be invalidated" for certain defects or irregularities stated, provided a majority of the tax-payers owning or representing a majority of the taxable property have consented. Section 2 again provides that no consent of tax-payers, nor the bonds issued or to be issued upon the faith of such consent shall be invalidated or held

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invalid on account of certain defects or irregularities, provided that the consent of the requisite majority has been obtained. Thus the legislature makes it emphatic that the fundamental prerequisite, on all occasions and for all purposes, must be the majority consent.

If the legislature had intended that there should be a conclusive determination that the requisite consents had been obtained before the bonds could be issued, it would have provided a tribunal, consisting of the commissioners, or the county judge, or possibly the assessors, which was to take proofs, hear parties, conduct a judicial inquiry and make a judicial determination.

If the law had simply required the assessors, town clerk or county clerk to make and file an affidavit that a majority of the tax-payers owning a majority of the taxable property had consented, and had stopped there, the affidavit would not have been any evidence of the facts stated in it, and a person suing upon one of the bonds would have been obliged to prove affirmatively that the requisite consents had been obtained (Starin *v.* Town of Genoa, 23 N. Y. 439; People *v.* Mead, 36 id. 224; Town of Venice *v.* Woodruff, 62 id. 463); and yet the affidavit in that case would have been just as much a judicial determination as the one we are considering. Such an affidavit is, therefore, evidence only so far as the law makes it evidence, and all it says is, that "it shall be evidence of the facts therein contained." This language is satisfied without holding that it shall be conclusive evidence. It is satisfied by holding that it is competent or prima facie evidence. By giving the language a more extended meaning the affidavit would have more force, we think, than was intended by the legislature. Where it was intended in similar acts that the affidavit, or the preliminary inquiry as to the number of consents, should be conclusive, it has been so expressly provided (Laws of 1863, chap. 19, and of 1864, chap. 402), or provision has been made for a formal hearing, for proofs and a judicial determination. (Laws of 1869, chap. 907, §§ 2, 9.) Where it is intended in a statute to make an affidavit or any writing conclusive evidence, there is usually something in the statute clearly to indicate such intention. (1 R. S. 173, § 22; id. 412, § 81; 2 R. S. 377, § 2; Code, § 1933. See also the statutes and authorities cited by Judge Allen in People ex rel. Martin *v.* Brown, 55 N. Y. 196.) In the case of People ex rel. Martin *v.* Brown, that learned judge, in an able discussion of the subject, holds that this affidavit is not conclusive evidence, but only competent or prima facie evidence of the facts stated in it. To give this affidavit the effect claimed for it, we would have to go against the spirit of many decisions in this court. The bonding acts are now regarded as hostile to a sound public policy. As said by Judge Andrews in Town of Wellsboro *v.* N. Y. and C. R. R. Co. (76 N. Y. 185), they "are subversive of the just rights of the minority, who do

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not consent to the issue of the bonds," and we have never been disposed to uphold bonds issued under these acts, except upon a strict and exact compliance with the act which authorized their issue. To hold that the ex parte affidavit of one assessor would be sufficient in its effect to bond a town when the facts authorizing it to be bonded did not actually exist, would be giving a construction to the language and purposes of this act altogether too liberal. In The People *v.* Mitchell (35 N. Y. 551), the affidavit that the requisite consent had been given was made conclusive by the statute. In Town of Springport *v.* The Teutonia Sav. Bank (75 N. Y. 397), the statute made the affidavit presumptive evidence; and hence those cases have very little bearing upon this case, although the principle to be deduced from them is favorable to the conclusion we reach. In Bank of Rome *v.* Village of Rome (19 N. Y. 20), the village was authorized to subscribe for the stock of a railroad company, provided that two-thirds of the tax-paying electors of the village should first approve the subscription, and the village was authorized to issue bonds to raise money to pay for such subscription, and railroad commissioners were named in the act. There was no dispute that the subscription had been approved by the taxpayers. But it was provided in section 11 of the act (chap. 283, Laws of 1853), that the commissioners should have no power or authority to negotiate, sell or transfer the bonds, or create any liability whatever, except upon the express condition that $500,000 should first have been subscribed to the stock by other parties; and the commissioners, before negotiating or transferring any of the bonds, should make and subscribe a certificate in writing that such subscription of $500,000 had been actually made, and that in their judgment and belief the same had been made in good faith and by persons of ability sufficient to pay their several subscriptions. It was held that the certificate thus made was conclusive evidence in favor of bona fide holders of bonds that the requisite subscriptions had been made. That case is claimed as an authority for the plaintiff's contention in this case. But while the distinction between the two cases is not very broad, yet there is a distinction which deprives that case of its character as a controlling authority in this. There the subscription to the stock had been regularly authorized. There was nothing more for the village or its taxpayers to do. Whatever else remained was committed to the railroad commissioners named in the act, as agents of the village. They were to determine whether the other subscriptions had been made, and if they found they had been, they were to issue the bonds, acting as agents of the village. The difficulty in this case is that the fundamental fact, the majority consent, is wanting. The town was to act through a majority of its tax-payers, and such action it never took. Until such action was taken no officer or agent could bind it by bonds issued or stock taken under the act.

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It is true that the assessors, in determining whether the requisite consents had been given and in making the affidavit, exercised quasi judicial functions. (Howland *v.* Eldredge, 43 N. Y. 457; People ex rel. Yawger *v.* Allen, 52 id. 538.) And that their determination embraced in their affidavit is in the nature of a judgment. But regarding the affidavit as a judgment, it was a judgment which they could render only if they had jurisdiction. By the express terms of the statute they were not to make the affidavit until the requisite consents were obtained. Until that time they had no jurisdiction to act. They could not obtain jurisdiction by determining that they had it. Whether quasi judicial officers and courts of limited special and inferior jurisdiction have jurisdiction to make a decision in any case is always open to inquiry, and their decision in any case can be attacked collaterally for want of jurisdiction. It was made the duty of town assessors to ascertain all the property and persons in their town liable to taxation, and in making the determination and assessing the property, their action is of a judicial character; and yet they cannot obtain jurisdiction over property or persons by determining that they have it. They must first have jurisdiction before they can lawfully act. (Nat. Bank of Chemung *v.* City of Elmira, 53 N. Y. 49.) So here, the assessors had no jurisdiction to make the affidavit and render their quasi judgment until the requisite consents had been obtained; and if the consents had not, in fact, been obtained, their determination that it had been could not give them unimpeachable jurisdiction.

The legislature was undoubtedly competent to declare what effect this affidavit as a quasi judgment should have, and it has said that it shall be evidence of the facts therein stated. It furnished prima facie evidence which it would generally be safe for all persons to rely on. In a suit upon the bonds it placed the burden upon the town defending against the bonds to show that the affidavit was made without jurisdiction, in that the requisite majority of the tax-payers had not actually consented. So that the affidavit served a very useful purpose, although not having the effect of a conclusive judgment binding upon all persons.

But the claim is made that the affidavit ought to be conclusive in favor of bona fide holders of the bonds. But there can be no bona fide holders of bonds, within the meaning of the law applicable to negotiable paper, which have been issued without authority. A town has no general authority to issue such bonds. It can issue them only by virtue of special authority conferred by some statute. Unless issued in the way pointed out by statute, they cannot bind the town. The statute specifies the powers of the agents of the town and the precise conditions upon which the bonds could be issued, and all persons taking the bonds are chargeable with knowledge of the statute, and they must see to it that the statute has been

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complied with before they can with absolute safety take the bonds. Such is the law as laid down in this State. (Town of Venice *v.* Woodruff; Starin *v.* Town of Genoa; People *v.* Mead, supra.) There are undoubtedly decisions of the Federal courts holding in favor of bona fide holders of such bonds a different doctrine; but those decisions have not been regarded as controlling authority in this court.

There are no facts in this case upon which it can be held that the town can be estopped from asserting the invalidity of the bonds. As a town, there is no act or omission chargeable to it upon which an estoppel can be based.

It follows, therefore, that the order of the General Term should be reversed, and that the judgment upon the report of the referee should be affirmed, with costs.

All concur, except Rapallo, J., absent.

Order reversed and judgment accordingly.

See note, p. 241.

WILLIAM W. WELCH et al.

v.

AUGUSTUS S. POST.

(99 *Illinois Reports*, 471. *June* 21, 1881.)

The court is inclined to hold that the act of February 28, 1869, amendatory of the charter of the Illinois South-eastern Ry. Co., in so far as it authorizes towns, etc., along or near the route of the road to subscribe to the stock of the company, or make donations and issue bonds therefor, is in violation of section 23, art. 3, of the constitution of 1848, which declares that no private or local law shall embrace more than one subject, which shall be expressed in the title.

Making donations to railway companies and issuing interest-bearing bonds in payment thereof, are not among the usual or implied powers possessed by municipal corporations, and without express power given by statute to issue such bonds they will be void in the hands of any and all persons.

Where a railway charter authorized any incorporated city or town on the line of the proposed road to make donations to the company, not exceeding $10,000, to be paid by immediate taxation, giving no power to issue bonds in payment, and an amendment to the charter named villages, counties and townships as corporations to which power was given, on a vote of the people, to make donations to the proposed railroad, and to issue interest-bearing bonds in payment thereof: *Held*, that bonds issued by an incorporated town after the passage of the amendatory act of 1869, upon a vote for a donation to the railway company, were illegal and void, being issued without sanction of law. The word town being omitted from the act authorizing the issue of bonds, cannot be supplied by judicial construction.

While it may be that a court of chancery has no jurisdiction to declare

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municipal bonds void which are held by non-residents who do not appear in the suit, yet the court has jurisdiction as to any such holder who appears and contests the bill on its merits, and also to enjoin the local officers from the collection of taxes to pay such bonds or the interest thereon.

WRIT of error to the Circuit Court of White county; the Hon. C. S. CONGER, Judge, presiding.

Mr. James McCartney, for the plaintiffs in error.

Messrs. Hanna & Adams, for the defendant in error.

This bill was brought by citizens, property owners and tax payers in the village of Enfield, to restrain the collection of taxes levied on the property of complainants for the purpose of paying any portion of the principal or interest on bonds issued by the town of Enfield to the Springfield and Illinois South-eastern Ry. Co., dated January 1, 1871, and to have such bonds declared null and void.

It is set forth in the bill, as the fact is, that under the act of March, 1869, the village of Enfield was incorporated, under the name of the town of Enfield, and that while so incorporated all the acts charged were done. In 1867, by an act of the legislature, the Illinois South-eastern Ry. Co. was incorporated. By that act any incorporated town or city might make donations to the railway company, not exceeding $10,000. An act amendatory of the act of 1867, passed February 28, 1869, authorized any village, city, county or township to make donations to the railway company, and it was therein provided, that if the majority of the legal voters of any such municipality, as evidenced by the votes cast at an election held for that purpose, were in favor of such donation, the corporate authorities of such village, city, county or township should issue bonds, with interest-coupons attached, for the payment thereof. Under the power supposed to have been conferred by the act of 1867, incorporating the Illinois Southeastern Ry. Co., and the amendatory act of 1869, the town of Enfield, at an election held on the 11th day of June, 1870, after due notice had been given, voted a donation of $7000 to the Springfield and Illinois South-eastern Ry. Co., and afterwards issued and delivered to the president of the company, bonds for the payment of the same, dated January 1, 1871, with coupons attached for the semi-annual interest, at the rate of ten per cent per annum.

As a ground of relief, it is alleged in the bill there was no authority of law for the issuing of any bonds by any incorporated town to the railway company, whatever; that section 11 of the charter of the company, passed in 1867, provided for donations by incorporated cities and towns, but made no provision for the issuing of bonds, and that the act of 1869, amendatory thereof, only made provision for the issuing of bonds by villages, cities, counties and townships, thereby excluding towns from the right to issue bonds, leaving such towns only the right, under the law of 1867, to make donations to be paid by a levy of a tax, and not otherwise. The

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bill also contains an allegation, which is not denied, that the town of Enfield was incorporated and acted under the law of 1869, incorporating it as a town until August, 1875. The relief asked by the bill on the final hearing was, that the bonds issued by the town of Enfield to the Springfield and Illinois South-eastern Ry. Co., dated January 1, 1871, might be declared null and void, and of no effect, in whosesoever hands the same may be, and that the village and county collectors, and their successors in office, be forever enjoined from collecting or attempting to collect any tax levied for the payment of the principal of the bonds or the coupons thereto attached, or detached.

Originally, only the village and county collectors of taxes and the unknown holders of the bonds were made defendants. Service of process was had on the resident-defendants, and publication was made as to the unknown bondholders. No one appearing to answer the bill, it was taken for confessed as to all of defendants at the April term, 1877, and a decree rendered declaring the bonds null and void, and making the injunction previously issued perpetual. Afterwards, at the October term, 1879, of the court, Augustus T. Post, a citizen and resident of the State of New York, presented to the court a petition under the statute, stating he was the owner of the bonds in litigation; that he was never served with process in the cause, and had no knowledge of the proceedings therein until after default was entered against the defendants. The prayer of his petition was granted, and the cause reinstated for further hearing. The allegations of the bill as to the incorporation of the town of Enfield and the issuing of bonds, as stated, are all admitted in the answer of respondents, and he alleges he is the owner of one of the bonds issued to the railway company, upon which all interest was paid for the years 1872 to 1875, both years inclusive.

A replication was filed to the answer of respondent, and the cause submitted for decision upon a stipulation as to the facts, substantially as follows: It was admitted the election held to make the donation to the railway company was regularly held, after due notice had been given to the legal voters of the town, that the railroad was constructed, and bonds and coupons were issued and delivered, and interest paid, until this bill was filed; that when the vote was taken for a donation, Enfield was an incorporated town, incorporated and acting under a special act of the legislature, and was such when the bonds were issued; that the donation was voted and the bonds issued to the Springfield and Illinois South-eastern Ry. Co., incorporated under the laws of 1867 and 1869, and consolidated December 3, 1869, and that said bonds were delivered about June 1, 1871; that no vote was taken to issue such bonds other than the vote for donation, held on June 11, 1870. The court dissolved the injunction previously issued, and dismissed the bill. Complainants bring the case to this court.

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The question is directly made, the amendatory act of 1869 violates the constitution of 1848, article 3, section 23, which provides: "No private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." On the authority of Middleport *v.* Ætna Life Ins. Co., 82 Ill. 562, we are inclined to hold the point is well taken, and if so, it would be conclusive of the whole case. Without passing on this question definitely, there is another view of the case that is equally conclusive, upon which the decision may be placed. Making donations to railway corporations, and issuing interest-bearing bonds in payment thereof, are not among the usual or implied powers possessed by municipal corporations. Unless, therefore, express power was given by statute to the town of Enfield to issue the bonds involved in this litigation, it will be conceded such bonds are void in whosesoever hands they may be found. Hence it will be necessary to examine and determine definitely what powers the general assembly has seen fit to confer on the town of Enfield in that regard.

As we have seen, the town of Enfield was incorporated under a special charter passed in March, 1869. The charter contained only the usual provisions found in such charters. No power was given the corporation created to make donations to railway companies, and make provision for the payment, by tax or otherwise. The act of 1867, incorporating the Illinois South-eastern Ry. Co., did provide that any incorporated city or town on the line of the proposed railroad might make donations to the company, not exceeding $10,000, to be paid by taxation. That act made no provision for and gave the corporation no authority to issue bonds in payment of such donations. Section 10, of the act of 1869, amendatory of the act of 1867, enumerated villages, cities, counties and townships as among the corporations to which power was expressly given, when the same should be voted by the legal voters of such municipalities, to make donations to the proposed railroad, and to issue interest-bearing bonds in payment thereof. Acting under the acts cited, the town of Enfield issued the bonds in question, after a donation of the amount of the bonds had been voted by the legal voters of the town at an election called for that purpose. It is stipulated, however, that no vote was taken to issue such bonds, other than the vote for a donation to the railway company. It will be specially noted, the original charter of the railway company only conferred power on towns on the line of the railroad to make donations to the company, to be paid by taxation, and hence no rightful authority existed under that act to issue the bonds in question. Town of Middleford *v.* Ætna Life Ins. Co., 82 Ill. 562. Nor is there any authority found in the amendatory act of 1869 that at all enlarges the powers of the town of Enfield in the matter of issuing bonds. Incorporated towns are omitted from the

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municipal corporations enumerated that may make donations to the railway company, and issue interest-bearing bonds in payment. Why incorporated towns were omitted in that act cannot now be known. It may have been done advisedly or inadvertently. In either case the effect is precisely the same. By the original act, as we have seen, incorporated towns have the undoubted right to make donations to the railway company, payable by taxation, but had no right to issue bonds, maturing in the future, in payment. The amendatory act does not even purport to confer additional authority on incorporated towns in that regard, neither in the title nor the text of the bill. What seems to have been deliberately omitted by the general assembly cannot be supplied by judicial construction. That would invade the legislative department, which the court has neither the right nor inclination to do.

In Pitzman *v.* Village of Freeburg, 92 Ill. 111, it was held the act of November 6, 1849, that authorized counties and cities to make subscriptions or purchases of shares of capital stock in any railway company, had no reference whatever to villages. The language employed only related to counties and cities, and the terms used could not be enlarged, by construction, so as to include municipal corporations not mentioned. That is precisely the case here. Towns are omitted for some reason from the corporations authorized to issue bonds in payment of donations voted. Such extraordinary power will not be held to exist in a purely municipal corporation unless expressly conferred by statute.

Burke *v.* Monroe County, 77 Ill. 610, cannot be regarded as an authority against this view of the law. The act construed in that case was one to restore uniformity in the taxation of real and personal property in the counties and cities of the State. In one part of the act incorporated towns were expressly mentioned, and it was thought the context authorized the construction that the word city, as used in the repealing clause of the act, was intended to and did include incorporated towns.

Nor does Martin *v.* The People, 87 Ill. 524, aid the construction insisted upon by defendant. That case holds that under the words, "any city, incorporated town or village," found in the 168th section of the act in relation to "cities and villages," the "town of Lake" is one of the municipal incorporations which, by that section, are authorized to avail themselves of the provisions of article 9 of that act, as an amendment to their charters.

Keeping in mind, as must be done, there is no implied authority in municipal corporations to make donations to railway companies, and to issue interest-bearing bonds in payment, it must appear there is express enabling legislation to that effect before municipal corporations can properly assume to exercise such extraordinary powers. No such authority is to be found anywhere, in any public or private law of this State, applicable to the town of Enfield, at

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the time that corporation undertook to and did issue the bond held and owned by respondent, and having been issued without authority of law, such bond constitutes no valid obligation that can be enforced against the municipality.

It is said the holders and owners of the bonds in this case all reside without the jurisdiction of the court in which the cause was tried, and have these bonds with them, and the argument is, that as both the persons to be affected and the property to be operated upon are without the State, the court was powerless to act, and for this reason, if for none other, the bill should have been dismissed, as it was. This is a misapprehension of the object and scope of the bill. The bonds are of the denomination of $1000 each, and six of them, it appears from the record, are held by non-resident owner or owners, and the bonds may be presumed to be with them. As neither the bonds nor the owners are subject to the jurisdiction of the court, it may be conceded that no decree could be rendered that would operate on the bonds or the owners. The owner of one bond, however, although a non-resident of the State, has submitted to the jurisdiction of the court by answering the bill, and his interests in the subject-matter of the suit may be determined by the decree to be rendered. But other relief is sought by the bill, and may be granted as to resident defendants, as to matters clearly within the jurisdiction of the court. On the hypothesis the bonds are void because issued without authority of law, no reason can be assigned why a court of chancery has not jurisdiction to enjoin the local officers from collecting taxes levied for their payment, otherwise irreparable injury might be done. As the parties and the subject to be affected by the decree are both within the jurisdiction of the court, it is not perceived how the non-residence of the owners of the bonds would affect the jurisdiction of the court to administer relief on this branch of the case.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

DICKEY and SHELDON, JJ.—We do not recognize any distinction, under the laws of this State, between incorporated towns and incorporated villages, but consider such terms, "towns and villages," to be there used synonymously; and we regard Martin v. The People, 87 Ill. 524, as so deciding.

See note, p. 241.

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GODDARD et al.

v.

STOCKMAN, Treasurer, et al.

(74 *Indiana Reports*, 400. *May Term*, 1881.)

The recital in the entry of a board of county commissioners, ordering an election in a township upon a petition therefor to vote aid for the construction of a railroad, "and proof being made that twenty-five of the petitioners are freeholders of Clinton township," is sufficient to show that such board found that the petition was signed by twenty-five freeholders of the particular township of their own county, and the mere fact that such recital was interpolated after the other parts of the entry had been completed does not affect the validity of the entry or the part interpolated.

While it is the better practice that the record of the proceedings of a board of county commissioners should be signed by the members thereof, yet unsigned orders of the board are not void, and, when properly signed within a reasonable time, become valid from the time when made.

A petition asking for an appropriation to aid in the construction of a railroad is not invalid for the reason that it does not ask for the annexing of conditions to the appropriation. The act of March 8th, 1879, Acts 1879, p. 46, enables petitioners and voters to annex conditions to appropriations, but does not compel them to do so if they do not desire any conditions.

While the law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and inquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court, and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof.

If, in such case, the one per cent levied for the current year amounted to less than one half of the amount of the donation asked, the remedy therefor is by appeal from the order whereby the levy was made.

The recital in the record of the order of the board of commissioners making such an appropriation, that "it is hereby ordered that a special tax of one per cent . . . be, and the same is hereby levied, . . . for the purpose of raising one half of the amount specified in said petition," is a sufficient granting of the prayer of the petition.

If, in making the levy for such donation, certain taxable property of the township was omitted from the assessment, the tax upon all other property that has been assessed is not thereby rendered invalid.

If an allegation of a pleading is one that the pleader can be heard to make, and it be well pleaded, then a demurrer admits it to be true, otherwise it does not.

From the Decatur Circuit Court.

J. D. Miller and F. E. Gavin, for appellants.

W. A. Moore, —— Bennett, C. Ewing, J. K. Ewing, C. Baker, O. B. Hord, and A. W. Hendricks, for appellees.

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WOODS, J.—The appellants, who were plaintiffs in the circuit court, sued as tax payers of Clinton township, Decatur county, to enjoin the collection of a tax levied for the purpose of aiding the Vernon, Greensburg and Rushville R. R. Co., by subscribing, on the part of the township, to $11,000 of its capital stock.

A demurrer to the complaint was sustained by the circuit court, and final judgment was rendered upon it in favor of defendants.

The substance of the complaint is as follows: That plaintiffs were tax payers of the township; that on the 19th of July, 1879, a petition purporting to be signed by twenty-five or more freeholders of the township, was filed in the county auditor's office, asking the county commissioners to make the appropriation; a copy of the petition is set out; that on the 21st of July it was presented to the commissioners, who ordered it spread upon the records, and thereupon made an order in the premises, which is set out in the complaint. It recited that proof was made that twenty-five of the petitioners were freeholders of the township. It directed the holding of an election on the 25th day of August, 1879, and that the auditor should give notice of the election.

The complaint states that that part of the order reciting that proof was made that twenty-five of the petitioners were freeholders of the township is an interpolation made subsequently, but does not state by whom made; that the record entry of the order was not signed by the commissioners or any of them, nor attested by the auditor until thirty days after the date it purports to have been signed; that no proof was made that the petition had been signed by twenty-five freeholders, and that it had not, in fact, been so signed; that the auditor gave notice of the election, a copy of which is set out; the certificates of the sheriff as to posting and publishing the notice are set out; that on the twenty-fifth day of August, 1879, a pretended election was had in Clinton and Washington townships, there having been a like petition from the latter township; that the officers of election of the two townships met on the 28th of August, at the court house, as a pretended canvassing board, and canvassed the vote of Clinton township, and certified the result to the auditor—67 for and 66 against the appropriation; their certificate is set out; that on June 10th, 1880, the commissioners, in regular session, ordered a levy of one per cent on the taxables of Clinton township; the order is set out; that the tax has gone on the duplicate, and the treasurer is about to enforce collection; that the taxables of the township on the duplicate of 1878 amounted to $590,000, and for 1880 to $492,000 only.

The complaint then assigns twelve objections to the validity of the tax, mostly matters of law. One of them, however, the eighth, states as fact that ten persons who voted for the appropriation were not residents or legal voters of the township, so that upon the legitimate vote there was a majority of nine against the measure.

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The first objection assigned is that the board had no right or authority to consider the petition nor to order the election or levy the tax.

The fourth objection is, that the board, prior to ordering the election, were not satisfied that the petition had been signed by twenty-five freeholders, and that the petition was not in fact so signed.

In appellants' brief these two objections are treated as raising the same point and are considered together.

The order of the county board recites as follows: "And proof being made that twenty-five of the petitioners are freeholders of Clinton township."

It is said that this means nothing more than that some evidence to that point was introduced, but that it does not show that the board "was satisfied with the proof." It is also said that the recital does not show that the "Clinton township" referred to in the recital was in Decatur county. When a tribunal having jurisdiction to decide as to the existence of a fact finds that it is proved, there would seem little room for doubt as to its being satisfied that the fact existed. When the commissioners of Decatur county, in considering a petition purporting to be signed by freeholders "of Clinton township, in said county," find that the petitioners were freeholders of "Clinton township," there is little room to doubt that they referred to Clinton township in their own county.

But it is said that the recital referred to was an interpolation, made subsequently to the making of the other portions of the entry.

The complaint copies the order of the commissioners, and this recital appears as a part of it. It was placed there presumably by the auditor, with the sanction of the board—at least nothing to the contrary is alleged. The only complaint made is, that it was written after the other portion of the entry, and after the day upon which the order was made. It it is not even charged that it was placed there fraudulently, or by an unauthorized person.

The mere fact, that the words were interpolated after the other part of the entry had been completed, in no manner affects the validity of the entry, or of the interpolated part. See Larr *v.* The State ex rel., 45 Ind. 364; Anderson *v.* Mitchell, 58 Ind. 592; Blair *v.* Lanning, 61 Ind. 499; Jones *v.* Carnahan, 63 Ind. 229; Kent *v.* Fullenlove, 38 Ind. 522.

No statute has been called to our attention or come under our observation, which requires that the proceedings of the board be signed by the members of the board, though it is doubtless the common usage, and the better practice, that the proceedings be so signed and authenticated. The auditor of the county is required to "attend the meetings of such commissioners, and keep a record of their proceedings," and "the commissioners of each county shall use a common seal; and copies of their proceedings, when

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signed and sealed by the said auditor, shall be sufficient evidence thereof, on the trial of any cause in any of the courts of this State." 1 R. S. 1876, p. 351, secs. 7 and 10. But conceding the propriety and necessity of the signatures of the commissioners, we are clear that unsigned orders of the board are not void, and when properly signed, within any reasonable time, become valid from the time when made. See authorities cited supra.

The next objection is, "Because the petition presented to the board of commissioners of said county does not ask that Clinton township make the appropriation of $11,000, but that the commissioners make the same."

The petitioners represent themselves as freeholders of Clinton township. The petition represents that the road runs through that township, and asks that the "board make an appropriation of eleven thousand dollars for the purpose of aiding in the construction of said road, by taking stock in said company, for said Clinton township."

The next objection is founded on the fact that the petition did not ask for the annexing of any conditions to the appropriation.

This court had decided, in the Indiana, etc., Ry. Co. *v.* The City of Attica, 56 Ind. 476, that it was not competent for a city to annex conditions to a donation as a consideration for making it. This was at the May term, 1877. At the next session of the Legislature, the act of March 8th, 1879, Acts 1879, p. 46, was passed, the purpose of which was to permit townships to aid railroad companies, either by taking stock or donating money, by annexing such conditions "as to freight, rates, location of machine-shops, depots, and such other terms and conditions as may be specified in such petition," etc. The obvious purpose of this act simply was to enable the petitioners and voters to annex conditions to the appropriation, if they saw fit to do so, and not to compel them to do so if they did not desire any conditions.

The fifth objection is, that the election "was held within less than thirty days after the making and signing of the order directing the same."

This proceeds on the assumption, already discussed, that the order for holding an election is without efficacy and void, until entered and signed by the commissioners. If the statute provided that the day to be named for the election should be not less than thirty nor more than sixty days from the making and signing of the order, the case would probably fall within the principle ruled in Kent *v.* Fullenlove, 38 Ind. 522. But that is not the provision. The statute directs that the board shall "order the polls . . . to be opened, on a day to be named in the order, which shall not be less than thirty nor more than sixty days thereafter," etc. Acts 1869, p. 93.

The sixth objection is not essentially different from the fifth, and need not be further considered.

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The seventh and eighth objections are based upon the allegation that, of the sixty-seven votes cast and counted in favor of the appropriation, ten were cast by persons who were not legal voters, and that, of the votes legally cast, there was in fact a majority against the appropriation.

It is said by counsel, that the demurrer admits this allegation to be true. But this takes for granted the question in dispute. If the allegation is one that the plaintiffs can be heard to make, and if it is well pleaded, then the demurrer admits it to be true. Otherwise it does not.

In this matter the county commissioners were performing a delegated governmental duty; for the maintenance of highways is one of the duties of government, and a railroad is recognized as a modern species of highway.

There is obvious necessity that the will of the people in the matter of aiding the construction of a railroad, as expressed at the polls, should in some way be authoritatively ascertained once for all. If left open to every tax payer, in a suit brought at his own pleasure, to go behind the returns of the officers of election and the determination of the county board, a measure supposed to be of public importance cannot be securely accomplised. At the suit of one citizen to enjoin the tax and "remove a cloud from his title," a jury might find one way, while another jury in another suit might find the other way. As was said in Shideler v. Clinton Township, 23 Ind. 479, "In such a case, public safety required that the determination shall be conclusive."

For the purpose of definitely and finally ascertaining the result, the Legislature has provided that the machinery of a general election shall be employed. Secs. 4 to 11 of the railroad act, 1 R. S. 1876, p. 736. In this case there was not only an official return of the vote by the sworn officers of election, but the county board made a finding that the majority of the voters at the election were in favor of the appropriation.

Against these views the council for the appellant say: "It has, however, never been the duty of any court or tribunal to pass upon the legality of these votes. When the ten illegal voters offered to vote, all the board of judges could do was to require the oath and affidavit required by sec. 21, 1 R. S. 1876, p. 439, and then, by sec. 22, they must receive the vote. They acted in a ministerial and not in a judicial capacity. When the board of canvassers met and organized, all they could do was, as commanded by statute, sec. 10, 1 R. S. 1876, p. 738, to 'carefully compare and examine the papers, and shall prepare and sign a statement of the whole number of votes cast, and the number for such appropriation to the railroad company and the number against it.' No power to hear evidence or purge the polls is given them. The statute further provides (sec. 11) that this statement shall be filed with

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the auditor, and recorded, and by sec. 12, that, 'If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition.' There is no provision made for any trial, any adversary proceedings or the hearing of any evidence, other than the statement filed by the board of canvassers with the auditor."

If convinced of the truth of these views, and that the appellants have never had any legal means of contesting the election, or the return thereof made by the canvassers, we should feel compelled to sustain the appeal and to hold that a remedy could be had by injunction. But we entertain a different view of the law. The statute expressly gives to any person aggrieved by any decision of the board of county commissioners a right of appeal therefrom to the circuit court. This right is not confined to the formal parties to the procedure, but any one, not a party, may show his interest by affidavit and have the appeal. The law for contesting elections is not applicable to elections such as this was, but, nevertheless, there was a practicable way open for making an efficient contest. The law is not, that, if a majority of votes returned be in favor of the appropriation, the board shall grant the prayer of the petition, but, if a majority of the votes cast shall be in favor of such railroad appropriation, the county commissioners, at their regular ensuing June session, shall grant the petition. This means the legal votes cast, and the board has the right to go behind the canvass of the vote and inquire into the truth of the return made; and any individual interested may appear before them and contest the result of the election, and, if aggrieved at the decision of the board, take his appeal to the circuit court. See Muncey *v.* Joest, post, p. 409; McKeever *v.* Ball, 71 Ind. 398; Houk *v.* Barthold, 73 Ind. 21; Brocaw *v.* The Board, etc., 73 Ind. 543, and cases cited.

The ninth objection is to the effect that the one per cent levied for the year 1880 amounted to less than one half of the amount of the donation. The remedy for this wrong, if it was a wrong, was also by an appeal from the order whereby the levy was made.

The next objection rests on the fact that a similar election was held in another township where there were two precincts, and the judges of all three precincts united in canvassing and certifying the vote of each precinct. The question thus presented has been already decided by this court. Mustard *v.* Hoppess, 69 Ind. 324.

The next objection to the levy is the alleged fact that the board never expressly granted the prayer of the petition for the appropriation. The board did, after making some recitals, say: "Wherefore it is hereby ordered that a special tax of one per cent upon the real and personal property of said township be, and the same is hereby, levied for the year 1880, for the purpose of raising one

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half of the amount specified in said petition." And we think this was a sufficient granting of the petition.

The last objection is, that $10,000 or over of the taxable property of the township was omitted from this assessment.

It is not shown why or how or by whose fault this property was not taxed and the argument seems to be that, if through any cause any taxable property is overlooked, the tax upon all other property that has been assessed should be enjoined. We do not understand the law to be so. The assessment act provides for the taxation of all such omitted property. Such an omission bears no analogy to the case of a turnpike professing to assess all lands within a mile and a half of the line, but omitting portions of the land within that limit.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

See note, p. 241.

THE COUNTY OF CLAY

v.

THE SOCIETY FOR SAVINGS.

(*Advance Case, United States Supreme Court. January* 23, 1882.)

Where bonds of a corporation which have passed into the hands of a bona fide holder recite on their face that all the conditions precedent to their lawful issue have been complied with, this recital is conclusive and binding on the corporation.

The want of performance of conditions precedent is a matter of defence for the corporation to allege and prove, in case of suit on the bonds.

The general statute of Illinois of November 6, 1849, in relation to county subscriptions to railroad stock, is not repealed, so far as it concerns the Illinois South-eastern Ry. Co., by section 7 of the act of February 26, 1867, to incorporate that company; i. e., by these two acts a county is not forbidden to subscribe to the capital stock as well as to make a donation to the said company.

Nor are the above acts repealed, so far as they concern the said company, by section 10 of the amendatory act of February 24, 1869.

Where a donation by a county to a railroad had been voted and the donation made on the books of the railroad previous to 1870, and the company had by that time partly done the work required by the county as a condition, this created a contract between the railroad and the county; and the bonds issued after 1870 to carry out that contract are not invalidated by the provisions of the Illinois Constitution of 1870 forbidding such subscription.

The payment of interest on its bonds for a long period is a waiver by the corporation of irregularities in their issue, when sued on by a bona fide holder for value.

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ERROR to the Circuit Court of the United States for the Southern District of Illinois.

On November 6, 1849, the Legislature of Illinois passed an "Act authorizing counties and cities in the State of Illinois to subscribe to the capital stock or make loans to railway companies," which contained the following provisions.

"SEC. 1. Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this State, such city or county may, and are hereby authorized to, purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000 for each of such cities or counties, and the stock so subscribed for or purchased shall be under the control of the County Court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

"SEC. 2. For the payment of said stock the judges of the County Court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding ten per cent per annum, and to pledge the faith of the county or city for the annual payment of the interest and the ultimate redemption of the principal; or if the said judges or common council should deem it more advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county making such subscription, to be drawn for that purpose in sums not less than $50, bearing interest not exceeding ten per cent per annum: Provided, That no bond shall be paid out at a rate less than par value.

"SEC. 3. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company at par and in lieu of cash.

"SEC. 4. No subscription shall be made, or purchase or bond issued by any county or city, under the provisions of this act, whereby any debt shall be created by said judges of the County Court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city—taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act—shall vote for the same; and the judges of the County Court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in the same manner as notices are given for election of State and county officers in said counties, requiring said electors of said counties or cities to vote upon the day named in such notices, at

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their usual place of voting, for or against the subscription for such capital stock which they may propose to make," etc., etc. (See Gross's Statutes of Illinois, 3d ed., pp. 552, 553.)

Afterwards, on February 26, 1867, the Legislature passed an act to incorporate the Illinois South-eastern Ry. Co., the seventh section of which was as follows:

"The County Court or board of supervisors—where such county has adopted township organization—of any county into or through which this road or its branches may pass, is hereby authorized and fully empowered to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding one hundred thousand dollars, and may order the clerk of the County Court or board of supervisors of such county to issue bonds of the county to the amount donated; and such clerk of the County Court or board of supervisors, as the case may be, of such county shall countersign and deliver such bonds so issued to the president or directors of said company; which said bonds may bear any rate of interest not to exceed ten per cent per annum, payable at the maturity of the bonds as hereinafter expressed, and yearly thereafter: Provided, That no donation by the County Court or board of supervisors of any such county shall be of a greater sum than fifty thousand dollars, until the question of such larger donation shall have been submitted to the legal voters of such county, at an election to be called, conducted, returns made, canvassed, and published, in the usual manner of calling, conducting, making returns, canvassing, and publishing special county elections, etc.

On February 24, 1869, an act was passed to amend the act to incorporate the Illinois South-eastern Ry. Co., section 10 of which provided:

"That any village, city, county, or township organized under the township organization law, or any other law of this State, along or near the route of said railway or its branches, or that are anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or make donations to said company, to aid in constructing and equipping said railway: Provided, That no such subscriptions or donations shall be made until the same shall be voted for as hereinafter provided."

The section then proceeded to declare that upon the application of twenty legal voters of any such city, village, county, or township, the clerk thereof should call an election to be held by the legal voters to determine "whether such village, city, county, or township shall subscribe to the capital stock of said company, or make a donation thereto to aid in building or equipping said railway, and whether to be subscribed or donated, and the rate of interest and the time of payment of the bonds to be issued in payment thereof. Section 12 of the act declared as follows:

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"That when payment of subscription to the capital stock of said company or payments for donations to said company have been or shall be made by villages, cities, counties, or townships, in bonds of such villages, cities, counties, or townships, under any acts authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties, or townships, and appearing regular on the face thereof, shall, in the hands of said company or any other bona fide holder thereof, be deemed and taken in all courts and elsewhere as prima facie evidence of the regularity of everything required by the several acts, in relation to the issuing of said bonds, or by any other act, to be done preliminary to the issuing and negotiation of said bonds."

On April 16, 1869, the Legislature of Illinois passed an act for the registration of municipal bonds in the office of the auditor of State, section 7 of which required that before any county bond could be registered the presiding judge of the County Court should certify under oath to the auditor that all the preliminary conditions to their issue required by law had been complied with. (See Underwood's Statutes of Illinois, page 994.)

The Constitution of Illinois which went into effect August 8, 1870, declares (second additional section): "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: Provided, however, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions when the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

This suit was brought in the court below upon certain bonds, with the coupons attached, of a series issued by the county of Clay to pay for stock in the Illinois South-eastern Ry. Co. subscribed scribed by the county board of supervisors, and upon certain bonds with coupons attached, of another series issued by the same county, to pay for a donation made to the same company by said board of supervisors, both series being issued, as was claimed, by authority of the foregoing legislation.

Although the bonds are under seal, the suit is called in the record an action of assumpsit, and the defendant pleaded non-assumpsit.

Upon the trial, a jury being waived, the court made an elaborate and comprehensive finding of the facts, in which is set out in full a copy of one of the bonds belonging to each class sued on, and of one of the coupons attached to each respectively.

The subscription series of bonds, as appears by the finding of the court, contained this recital: "This bond being issued under and

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pursuant to orders of the board of supervisors of Clay county, Illinois, for subscription to the capital stock of the Illinois South-eastern Ry. Co., as authorized by virtue of the laws of the State of Illinois. And the faith of the county of Clay is hereby irrevocably pledged for the payment of said principal and interest as aforesaid."

The donation series of bonds the court found to contain the following recital: "This bond is one of a series of bonds issued by Clay county to aid in the construction of the Illinois South-eastern Ry. Co., in pursuance of the authority conferred by an act of the General Assembly of the State of Illinois, entitled 'An act to incorporate the Illinois South-eastern Ry. Co.,' approved February 25, 1867, and an act amendatory thereof, approved February 24, 1869, and of an election of the legal voters of Clay county, Illinois, held on April 22, 1868, under the provisions of said act."

"This bond is not to become a binding obligation of the said county of Clay until the following conditions shall have been complied with, to wit: this bond to become due and payable on the express conditions that said company shall have completed the whole length of its line from Shawneetown, on the Ohio River, to the Chicago branch of the Illinois Central R. R., and shall have the cars running thereon."

Upon the back of each one of the donation series of bonds was printed the following certificate:

"STATE OF ILLINOIS, } ss.
Clay County, }

"I, John L. Moore, clerk of the County Court of Clay county, in the State of Illinois, do hereby certify that the County Court of said county have entered an order on the records of said County Court directing me to indorse upon this bond the following words, to wit: All the conditions upon which this bond was to become a binding obligation of the county of Clay have been complied with.

"In testimony whereof, I hereto affix my hand and the seal of said court, at Louisville, this 4th day of January, A. D. 1871.

[SEAL.] "JNO. L. MOORE, Clerk."

Upon all the bonds of both series was printed the certificate of the auditor of public accounts, as follows:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
"January 9, 1871, Springfield.

"I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of 'An act entitled "An act to amend an act entitled 'An act to incorporate the Illinois South-eastern Ry. Co.,'" 'approved February 24, 1869, as well as the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869.

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"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] "C. E. LIPPINCOTT, Auditor P. A."

The court further found that on March 2, 1868, the board of supervisors of Clay county made an order calling an election to be held by the qualified voters of the county upon two propositions: first, that the county should subscribe one hundred thousand dollars to the capital stock of the Illinois South-eastern Ry. Co., and issue in payment thereof the bonds of the county for an equal amount; and second, that the county of Clay should donate fifty thousand dollars to the railway company, and issue bonds of the county to pay such donation; that the election was held in accordance with the order of the board of supervisors and resulted in a majority of votes being cast in the county in favor of both of the propositions; that at a special meeting of the board of supervisors, held on the first Monday of November, 1868, the president of the board was instructed by resolutions duly passed by the board, to make such donation, and to subscribe said amount upon the books of said railway company, the subscription and donation to be made strictly and only in accordance with the terms of the proposition aforesaid, submitted and voted upon on April 22, 1868.

The court also found that the railway company had located its road and graded, bridged, and tied ten miles thereof before the 1st day of November, 1869, and that on that day the president of the board of supervisors made the subscription upon the books of the railway company, under and in pursuance of the submission, vote, and resolution aforesaid, the subscription being made upon the terms and conditions aforesaid.

The court further found that the one hundred thousand dollars of bonds so voted as subscription as aforesaid were delivered to the railway company on November 1, 1869, and subsequent thereto, the company having fully complied with the terms and conditions of said vote before receiving the bonds.

The court further found that on January 1, 1871, "the fifty thousand dollars so donated as aforesaid, under and in pursuance of the vote aforesaid, in the bonds of said county, were delivered and donated to said railway company, said railway company having complied with the conditions of said vote," etc.

The court also found that both series of bonds had been registered in the office of the auditor of public accounts, and that taxes had been certified by him and the interest paid on the bonds up to the commencement of this suit.

The findings of the court further state that the plaintiff purchased all the bonds sued on for full value before maturity, and was an innocent holder thereof without notice of any irregularity in the issue, except such constructive notice as the law charges it with.

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Hagle & Finch and Henry, Cook & Lord, for plaintiff in error.
D. T. Littler, for defendant in error.

Woods, J.—Two classes of bonds are sued on, namely, the subscription bonds and the donation bonds. The defences set up against each class will be separately considered.

The findings of the court and the sections of the act of 1849, above recited, furnish ample ground for the judgment which the court below rendered in favor of the defendant in error upon the subscription bonds held by it.

The plaintiff in error, however, insists that there is no evidence or finding that the thirty days' notice of the election required by the statute had been given, or that a majority of the legal voters, taking as a standard the number of votes thrown at the last general election for county officers, voted in favor of the proposition to subscribe stock and issue the bonds of the county to pay for it.

There are three conclusive answers to this contention.

First, the bonds recite on their face that they were issued under and pursuant to the orders of the board of supervisors of Clay county, as authorized by virtue of the laws of the State of Illinois. By the act of November 6, 1849, it was provided that the judges of the County Court were authorized to issue the bonds of the county only in case a majority of the voters of the county, taking as a standard the number of votes thrown at the next preceding general election, should vote in favor of the proposition to subscribe to the stock of some designated railroad company and pay for it by the issue of county bonds. The ultimate decision of the question whether such a vote had been cast was, therefore, left with the judges of the County Court. The recital made in the bonds that they were issued pursuant to the orders of the board of supervisors, the successor of the County Court, as authorized by virtue of the laws of the State of Illinois, is equivalent to a declaration by the board of supervisors, upon the face of the bond, that the election had been held and had resulted so as to authorize the lawful issuing of the bonds. When the bonds are in the hands of a bona fide holder this recital is conclusive and binding upon the municipality. (Town of Coloma *v.* Eaves, 92 U. S. 484; Marcy *v.* Township of Oswego, Id. 637.)

The second answer is, that if the county had under the law authority to issue bonds, and it did issue them, and they went into circulation and came to the hands of a bona fide holder, he was not, in a suit upon the bonds, required to aver or prove the performance of any of the requisites necessary to give them validity. The want of such performance is a matter of defence, and the burden of proof is upon the county to establish it. (Lincoln *v.* Iron Co., 103 U. S. 412.) In this case the plaintiff in error offered no evidence in any degree tending to show that the conditions precedent upon the performance of which the law author-

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ized the issue of the bonds, had not been complied with. He cannot, therefore, assume that the conditions were not performed, and insist on the want of performance as a defence.

The third answer is, that by section 12 of the act of February 24, 1869, amendatory of the act to incorporate the Illinois South-eastern Ry. Co., and which was indorsed on the bonds, it was expressly provided that when payment to the capital stock of said company should be made in the bonds of counties or townships, under any act authorizing such subscription, all such bonds issued by the proper authorities and appearing regular on their face should, in the hands of a bona fide holder, be deemed and taken in all courts and elsewhere as prima facie evidence of the regularity of everything required by the several acts, in relation to the issuing of said bonds, or by any other act, to be done preliminary to their issue and negotiation.

As no proof has been submitted of any irregularity in the issuing of the bonds, this section of the law is conclusive against the existence of any.

It is next insisted by plaintiff in error that the general statute of November 6, 1849, so far as it concerned the Illinois South-eastern Ry. Co., was repealed by section 7 of the act to incorporate that company. That section authorized the County Court of any county, or the board of supervisors—when the county had adopted township organization—to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding one hundred thousand dollars, and to issue to the company its bonds in satisfaction of said donation; provided that no donation of a greater sum than fifty thousand dollars should be made until the question of such larger donation should have been submitted to the vote of the legal voters of the county and a majority thereof should have voted in favor of such donation. The contention is that it was not the purpose of the Legislature in these enactments to permit a county to purchase or subscribe to the capital stock of a railroad company and also make a donation to the same company.

There is not a word in the charter of the Illinois South-eastern Ry. Co. which expressly excludes it from the benefits of the general railroad subscription law of November 6, 1849. Nor is there the slightest repugnancy between the provisions of the two acts. The latter, being a general law, authorized any city or county in the State to purchase or subscribe to the capital stock of any railroad company anywhere in the State; the former being an act to incorporate a private corporation, authorized any county through which the railroad of the company or any of its branches might pass to make a donation to the company as a bonus or inducement towards the building of the railroad or its branches. There is no ground whatever for the contention that the general law was

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repealed or modified, in any respect, by the act incorporating the Illinois South-eastern Ry. Co. There is no repugnancy or inconsistency between them. A statute can be repealed only by an express provision of a subsequent law; or by necessary implication. To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. (McCool *v.* Smith, 1 Black, 459; Wood *v.* United States, 16 Pet. 342.)

We are of opinion, therefore, that the act incorporating the Illinois South-eastern Ry. Co. does not repeal or modify the general law of November 6, 1849.

The plaintiff in error further insists that section 10 of an act approved February 24, 1869, amendatory of the charter of the Illinois South-eastern Ry. Co., had the effect to repeal not only section 7 of the charter of the company, but also the general law of November 6, 1849, so far as it concerned the said railroad company.

This section provides "that any village, city, county, or township along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or make donations to said company to aid in constructing and equipping said railway;" provided the same shall be voted for at an election called by the clerk of the village, city, county, or township, upon the written request of twenty legal voters thereof, and upon thirty days' notice.

Conceding that this section is a substitute for section 7 of the original charter, it cannot be held to repeal the general law, for the reasons already stated in reference to section 7 of the original charter, namely, that there is no direct repeal, and there is no repugnancy between the two acts which would make a repeal by implication.

The subscription bonds sued on were, according to the findings of the court, issued in substantial conformity not only with the general act of November 6, 1849, but also with the amendatory act of 1869, so that, conceding that the latter act is applicable to the issuing of the bonds in question, they are valid in the hands of a bona fide holder. When these bonds were issued there was ample authority for their issue under the laws of the State of Illinois. The recital that they were issued in conformity with the laws of the State, as already shown, is binding on the county, when the suit is brought on the bonds by a bona fide holder, and concludes the county from setting up any irregularities in their issue, if any existed. We are of opinion, therefore, that the suit upon the subscription bonds was well maintained.

The objections to the bonds known and designated as donation bonds have nothing substantial in them. The bonds refer on their face to the laws which authorized their issue, and recite that they were issued in pursuance of authority granted thereby. They car-

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ried an endorsement made by the clerk of the County Court of Clay county, by order of the court and under its seal, that all the conditions upon which the bonds were to become a binding obligation of the county of Clay have been complied with; and printed on every one of them is a copy of section 12 of the act of February 24, 1869, amendatory of the charter of the Illinois South-eastern Ry. Co., which makes the fact of the negotiation of the bonds in payment of a donation to said company to be prima facie evidence of the regularity of their issue when in the hands of a bona fide holder. There is no proof or offer of proof that they were not issued in conformity with the requirements of law.

The plaintiff in error argues, however, as conclusive against the validity of these bonds, the fact that they were not issued until after August 8, 1870, the date upon which the present constitution of Illinois went into effect, which by section 2 of article 14 declared that no municipal corporation should make donations to any railroad or private corporation.

The findings of the Circuit Court show that the people of Clay county on April 22, 1868, voted in favor of a proposition to donate fifty thousand dollars to the Illinois Southeastern Ry. Co., provided the railroad of said company should be located on a certain line specifically described, and provided the bonds issued in payment of such donation should not be payable until the railway had been completed the whole length of the line from Shawneetown, on the Ohio River, to the Chicago branch of the Illinois Central R.R., and the cars running thereon; that on the first Monday of November, 1868, the board of supervisors of the county, by resolution duly passed, directed its president to make the donation aforesaid upon the books of the railway company, in accordance with the condition of said vote, and that before the 1st day of November, 1869, the railway company had located its line of road as required by the conditions upon which the donation was to be made, and had "graded, bridged, and tied ten miles thereof."

We think it may be fairly deduced from the findings of the court below that on November 1, 1869, the president of the board of supervisors subscribed upon the books of the railway company, as directed by the board of supervisors, the donation of fifty thousand dollars which the county had voted, and the brief of counsel for plaintiff in error distinctly admits that such is the proper construction of the findings of the court.

These transactions made a contract between the county and the railway company to the effect that in consideration that the railway company should construct its road upon the line designated, and should complete it and have the cars running thereon betweeen the points mentioned, the county would deliver its bonds to the railway company in satisfaction of its donation. This contract had been partly performed by the railway company before the constitution

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of 1870 went into effect. The adoption of the constitution could not annul or impair it. The county was bound, notwithstanding the provision of the constitution of 1870. (Town of Concord *v.* Savings Bank, 92 U. S. 630.)

And when, as appears by the findings of the court, the railway company had, on January 1, 1871, fully completed its road according to the terms upon which the donation was to be made, it was entitled in law under its contract to the bonds of the county, in satisfaction of the donation.

There was, therefore, authority to issue these bonds upon the conditions prescribed. The court below has found that the defendant in error is a bona fide holder, and that the railroad company had complied with all the conditions upon which the bonds were to be issued to it. Upon this state of facts the attempt of the plaintiff in error to avoid its liability upon these bonds seems a hopeless undertaking.

Other defences are set up against a recovery in this case. Plaintiff in error alleges that the authority to donate fifty thousand dollars to the railway company was expressly conferred upon the board of supervisors without any vote or precedent condition whatever, and the authority being conferred upon the board could not be by it "delegated to the people to be voted upon at a popular election." It further alleges that the bonds are not negotiable, and it insists that the authority of the board of supervisors, under the original charter of the railway company, to make the donation was repealed by the amendatory act of February 24, 1869.

These defences do not, in our judgment, merit reply.

The plaintiff in error has received in consideration for the issue of both the subscription and donation series of bonds everything for which it bargained. The bonds were regularly issued and have been registered under the statute of Illinois with the auditor of public accounts, upon the strength of a certificate under oath, made by a supervisor of the county pursuant to law, to the effect that all the preliminary conditions to the issue of the bonds required by law had been complied with. The record shows that taxes had been levied to pay interest, and that interest had been paid on the subscription bonds for eleven years and on the donation bonds for nine years. This fact would of itself cure mere irregularities in the issuing of the bonds when they were sued on by a bona fide holder for value. (Supervisors *v.* Schenck, 5 Wallace, p. 772.) Under these circumstances, when a suit is brought on them by a bona fide holder for full value, as found by the Circuit Court to be the case here, some substantial defence must be set up by the county before it can escape its liability. Such defences as are relied on in this case will not avail.

Judgment affirmed.

Affirmed.

See note, p. 241.

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THE NATIONAL BANK OF LAWRENCE

v.

OLIVER BARBER, as Treasurer of Douglas Co., et al.

(24 *Kansas Reports*, 584. *July Term*, 1880.)

Section 7 of chapter 90 of the Laws of 1870, p. 90 (and of chapter 84 Comp. Laws of 1879, pp. 796, 797), so far as it attempts to divert any portion of the general county tax or general township tax to the payment of a certain class of township railroad bonds, is void, being in contravention of section 4 of article 11 of the constitution, which provides that "no tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied."

ERROR from Douglas District Court.

Action brought by the National Bank, of Lawrence, against Barber, as treasurer of Douglas county, and the Township of Eudora, in said county. The petition, among other matters, alleges that—

"Under and by virtue of ch. 90, Laws of 1870, the township of Eudora did, on the 1st day of May, 1872, make and cause to be issued in the name of said township, $15,000 of its bonds, to pay for the like amount of the capital stock of the St. Louis, Lawrence and Denver R. R. Co., to aid in building the railroad of said railroad company through said township; said bonds were issued in full compliance with said law, and the railroad so sought to be aided in its construction was built through said township, and the capital stock therein was issued and delivered to said township for its said bonds; that said bonds were made due and payable in twenty years from their date, and bear annual interest at the rate of six per cent per annum, evidenced by interest coupons for each year's interest attached to the said bonds, and said bonds were made payable to said railroad company, or bearer; that the plaintiff is the owner and holder, for value, of coupons on said bonds to a larger amount than $1,000, that have matured since the first of May, 1873; that it did also recover a judgment on its coupons attached to said bonds, in the circuit court of the United States for the district of Kansas, in an action wherein it was plaintiff and said township of Eudora was defendant, on or about June 5th, 1877, for the sum of $1,460.84, and costs of suit; that said coupons and said judgment are all unpaid and each of them, and said township has no other funds to pay them, save that hereinafter mentioned, and has levied no taxes under § 6 of said ch. 90, Laws 1870; that for the year 1878 there was levied on the railroad so built as aforesaid, in said township, for township purposes, about the sum of $680, and for county purposes about $400, each of which sums of money

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has been collected and is now held by the defendant, Oliver Barber, as treasurer of said county of Douglas; that the plaintiff has applied to him for said sums of money and each of them, to be paid on said coupons and on said judgment and on each of them, so far as they would extend, but that said Barber fails and refuses to pay any of said sums, or any part thereof, to the plaintiff, as he is bound to do under § 7 of said ch. 90, Laws 1870, claiming that he is in doubt as to whom he should pay, and whether the plaintiff is entitled to it or any part thereof, and setting up that the defendant, said township, through its trustee, claims said moneys or a part thereof.

"Wherefore, the plaintiff prays the judgment of the court that said Barber pay over to it said moneys, or such part thereof as plaintiff is entitled to, and for such other and different relief as the court may give."

The cause was submitted to the court at the October Term, 1879, for its decision on the petition and the answers therein, and the following stipulation:

"If the court holds that section of the law referred to in the petition herein—to wit, sec. 7 of ch. 90 of the Laws of 1870—valid in whole, then the defendant Barber shall be adjudged to pay over to the plainttff the funds received by him or in his hands, as set forth in the petition, as county and township taxes on the railroad in the petition stated. If the court holds said law valid as to the township taxes on said railroad, and not valid as to the county taxes mentioned therein, then the said Barber shall be adjudged to pay the said plaintiff the amount of funds in his hands, realized as township taxes, as stated in the petition. If the court shall decide said law valid as to said county taxes on said railroad, in the petition set forth, and not as to township taxes, then the said Barber shall be adjudged to pay the said county taxes to the plaintiff. If the court shall decide said section of said law wholly invalid, the judgment to be for defendants for costs—both parties reserving the right to prosecute error in said action to the supreme court. All other questions expressly agreed to be with the plaintiff."

Upon hearing the cause, the court found and decided that said § 7 of ch. 90, Laws of 1870, referred to in the plaintiff's petition, is wholly invalid; and the court therefore ordered that the defendants go hence without day, and recover their costs; to which ruling the plaintiff excepted, and it has brought the case to this court.

S. O. Thatcher, for plaintiff in error:

1. Under our constitution and form of government, it is conceded that all legislative power is vested in our legislature, save where it is clearly restrained by the constitution. Const. of Kas., art. 2, § 1; 4 Kas. 124; 7 id. 87, 88, 536, et seq.; 8 id. 323.

2. The law is uniform, and so complies with the constitution. 12 Kas. 321.

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3. The power of the legislature to prescribe and apportion taxes cannot be questioned by the courts. 7 Kas. 539; 49 Mo. 501, and cases there cited. The question of a uniform tax has been fully discussed in Sedgwick on Con. and Stat. Law, 502–5 (2d ed.), and in Cooley on Taxation, 428, 429.

4. The county and town are part of the state, and under its control. Dillon on Mun. Corp., §§ 10a, 34, 35, 36, and note; 12 Ill. 9. County and township funds are under legislative control. Counties, as to powers and duties, remain under legislative control. 15 Ill. 480. As to marked differences between cities and counties or towns, see Dillon, 761–5, and cases cited. Also, 8 U. S. Digest, N. S., 1877, § 105, p. 196; 10 Kas. 564. For a strong case on this plenary power of the legislature, see 63 Ill. 66.

5. This law is similar in principle to statutes in other states. 11 Ill. 202–9. This case holds the power of the state to set apart a certain part of a county fund for a specific use. A statute similar to the one in question was discussed in 58 Ill. 456–8, and though held invalid on other grounds, was not questioned on this.

6. This court gave a general comment upon this law, in 13 Kas. 188, 189, and did not express any doubt at all about this § 7, though not commenting upon it. The whole reasoning in the case, however, sustains the view of the complete power of the legislature to pass the act in question, for it involves the question of making the county liable for expenses and duties pertaining to a single township. If it was competent for the legislature to impose the burden of paying all the preliminary expenses for the township upon the county, it was equally competent to provide that the funds of the county or township should be applied to the payment of the bonds to be issued under the law. The apportionment of county and township funds was clearly within the legislative power.

7. We may go further. The funds so raised under § 7 cannot be used for any other purpose, at least without legislative sanction, and it is a serious question whether the legislature can authorize a diversion. But as to the inviolability of the fund, as the law now stands, it seems to me there is no real question. The point seems to be passed on in 11 Kas. 209–218. The funds mentioned in § 7 came into the defendant's (Barber's) hands, appropriated by law to a specific use. Can he "divert the funds from that purpose without making himself and sureties liable to the holder of the indebtedness" meant to be paid by these funds?

8. It seems quite evident that this provision of § 7 entered into and became a part of the contract between the bondholder and the township and county. 11 Kas 209 et seq.; Sedgw. on Stat. and Con. Law, 588–9, 608–9. The case of Brooklyn Park Co. v. Armstrong, 45 N. Y. 234–246, is quite in point here. There the funds arising from the sale of certain lands were pledged to the payment of bonds to be issued by the city, although the general liability of

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the city was also pledged. The court of appeals held that this specific security could not be taken away by any subsequent act of the legislature. The point is expressly ruled in Von Hoffman *v.* Quincy, 4 Wall. 550. The court holds: "It is also settled that the laws which subsist at the time and place of making the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces those which affect its validity, construction, discharge, and enforcement."

This exposition of the law from our highest court accords with the views of this court in 4 Kas. 250, where it was held that funds coming into the treasurer's hands for interest on county bonds cannot be diverted by any order made by the county board. In the case under § 7, a certain sum of money came into the treasurer's hands, charged with a trust. He is bound to fulfil that trust.

J. W. Green and Geo. J. Barker, for defendants in error:

Plaintiff in error bases its claim to this money upon sec. 7, ch. 90, Laws of 1870. Defendants in error claim that said section is in violation of section 1 of article 11 of the constitution of this State, the first clause of which section declares "that the legislature shall provide for a uniform and equal rate of assessment and taxation." Any law, therefore, which by its terms provides, either directly or indirectly, that taxes shall be assessed and collected by a method which shall not be uniform and equal, is in violation of this clause of the constitution, and void. It is not contended that by uniformity and equality each piece of property of equal value throughout the State, or throughout a county, must pay the same amount of tax; but it is contended that the rate of taxation shall be uniform throughout a certain district, and that each piece of taxable property throughout a county shall bear its just proportion of taxes raised for county purposes, and each piece of taxable property within a township shall bear its just proportion of township expenses and indebtedness. 2 Black, 510; 19 Wall. 650; 3 Ohio St. 1; 9 Wis. 410.

That § 7 of ch. 90, Laws of 1870, is objectionable for the reason that it is in contravention of the first clause of § 1 of article eleven of the constitution, there can be no doubt. It is true that it does not exempt any railroad built within the State, wholly or in part by township aid, from taxation, but it does provide for an ununiform and unequal taxation of the property within any county in which a railroad has been built in whole or in part by the aid of any township within such county. It in effect provides that the property of so much of a railroad as lies within a township which has aided in the construction of the railroad, shall be exempt from bearing its just proportion of county and township expenses and indebtedness. Said § 7 provides in effect that that portion of the St. Louis, Lawrence and Denver R. R. which lies in Eudora town-

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ship shall be exempt from paying any portion of the tax raised to defray the county expenses and indebtedness, and also be exempt from paying any of the general expenses of that township. Such a law is repugnant to the first clause of § 1 of article 11 of the constitution. 19 Kas. 234, 316; 37 Cal. 246; 59 Ill. 142.

But it is claimed by plaintiff in error that these taxes have been already collected, and that the legislature has the power of appropriating them in such a way and for such purposes as it sees fit. In this transaction between the township and the railroad company, the township acted as a private corporation, and as such is interested in the management of said road, and is held to the same liabilities and rules as a private corporation. (53 N. Y. 141; 31 Pa. St. 185; 3 Hill, 531.) If, therefore, the proposition contended for by plaintiff in error is correct, the legislature has the power to appropriate the funds belonging to one municipal corporation to cancel the private indebtedness of another. The answer of plaintiff in error is, these taxes are not the property of the county of Douglas as the funds of a private corporation are the property of such corporation, and therefore the power of the State to direct the application is plenary.

The cases cited by plaintiff in error are cases in which the legislature assumed to direct the revenues of the county to the particular purpose for which they were raised. It is not denied that if a revenue has been raised for a particular purpose that the legislature has the power to compel its application, or that if the object for which a certain tax has been raised fails, that the legislature may direct its application. Cooley on Taxation, 494, and cases cited.

It is true that some of the cases in New York and Pennsylvania go to a great extent, but it is submitted that their constitutions do not contain the restrictive clause contained in the constitution of Kansas. "To tax the property of one township to pay the debt of another township, is an extraordinary and uncommon kind of taxation. It can only happen by the change of the boundary lines of one or more townships." (19 Kas. 243.) But does not section seven indirectly, if not directly, do this? It appropriates the money raised by the county by taxation to meet and discharge its indebtedness, to the payment of the private bonded indebtedness of one of its townships. The case of Sleight *v.* The People, 74 Ill. 47, is in point, and, as it appears, is decisive of this case; also, 22 Wis. 660.

The appropriation of the tax levied against said road for county purposes is to impose a debt upon said county, without its consent. That this is ultra vires, see 24 Mich. 44; 28 id. 228; 27 Wis. 418; 51 Ill. 18; 58 id. 463; 31 Vt. 226–236; 16 Mass. 76, 216; 2 Greenl. 28, 32; 6 id. 112.

The act in question is in direct violation of § 4, article 11, of the constitution of Kansas. Sec. 7 of ch. 90 provides that if any county

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or township tax shall be assessed and collected from any railroad which may have been built, in whole or in part, in any township which may have subscribed stock as provided in the foregoing sections, all such county or township tax arising from said railroads, within said township, shall be set apart and held by the treasurer for the benefit of such township, and applied to the payment of the interest and principal of said bonds; but the constitution of this state provides that taxes shall be levied in pursuance of a law which shall distinctly state its object, to which object only such tax shall be applied. It is the taxes provided for by § 83, ch. 107, and § 22, ch. 110, Comp. Laws 1879, which the plaintiff in error seeks to appropriate to the payment of its claim. It will be observed that § 7 does not provide that a tax shall be assessed and collected against this railroad for the specific object of paying the interest and principal of said bonds (and if it did the section would be unconstitutional, for reasons heretofore assigned), but it provides that the treasurer of the county shall apply taxes which have been assessed and collected for other and specific objects, to the discharge of the principal and interest, to wit, taxes assessed and collected for county and township purposes; but plaintiff in error says that the funds mentioned in § 7 came into defendant's (Barber's) hands appropriated to a specific use, and that they cannot be used for any other purpose, and that use and purpose is alleged to be, in plaintiff's petition, county and township purposes.

Plaintiff in error seems to agree that these funds cannot be so appropriated, on account of this constitutional provision. (6 Kas. 353; 11 id. 209–218; 22 Wis. 660.)

If it shall be held that the taxes assessed against the said road can be thus diverted, there can be no limit. If the legislature has the power to divert these taxes to this purpose, it has the power to direct that all the taxes raised in said township for county purposes shall be appropriated to the payment of this township debt.

There can be no reason given why the taxes assessed against that railroad shall be thus applied, which will not apply with equal force as to taxes assessed against any other property within the township.

S. O. Thacher, for plaintiff in error, in reply.

In the case of Sleight *v.* The People, 74 Ill. 47, the court rests its decision on a peculiar provision of the state constitution, which in effect provides that corporate taxes can only be levied for corporate purposes. The entire argument turns upon the construction of this prohibition, and the court holds the case to come within it. But this case seems to admit that the township taxes on the railroad, within the towns subscribing for stock in the railroad, should be appropriated as provided by statute. The precise question before the court was the power of the legislature to provide that taxes levied for county and township purposes upon the railroad "in the

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towns of Oxford and Clover," which towns had not taken stock in the railroad company, could be used to pay the principal of bonds not issued by those townships. The court carefully limits the opinion to this, and, as to it, holds the law invalid. So far from holding, as the defendants in error seem to suppose, with them, by clear implication the case holds with us. The court does not decide that the sums levied for county purposes in the towns subscribing stock, cannot be used as provided by statute, but it holds that taxes levied for county or township purposes in townships not interested in the railroad, cannot be used to pay the debt of those townships that are; this is the extent of the decision. And even this decision seems in conflict with former adjudications of the same court. (5 Gilm. 405–416; 12 Ill. 8.)

This question, as presented by defendants in error, is fully discussed in Cooley on Taxation, pp. 110–116, and the plenary power of the legislature over the matter is clearly upheld. (See also Cooley Const. Lim. 237, 740.)

The county, under the law in question, in certain respects acts for the township; it assists the township to effectuate the purposes of the act. It aids it in bringing into existence and creating property, for purposes of taxation, that did not exist before. This being so, why is it not competent for the legislature to provide that the county's share in developing this new property which it has helped to create in the township, shall be the revenue it can derive from it? May not the legislature, in its wisdom, devise means for municipalities to aid in public improvements, such as railroads, mill-dams, schools, by devoting to their support the excess in revenue derived from the newly-created property? There is nothing in the constitution prohibiting it, either directly or indirectly.

It seems hardly worth while to say that this law does not exempt any property from taxation, though if it did it would appear to be within legislative discretion. (19 Kas. 234, 311, 312.)

As to § 4, article 11, of the constitution, our contention is that these funds, township and county, raised by taxation on the railroad within Eudora township, were levied and paid for a specific purpose; that this purpose is declared by law to have been that of the municipal authorities levying the taxes, and of the property-holders in paying them. No law could be more specific than the one under consideration; no object more accurately designated for which the taxes should be appropriated. Language cannot be more plainly used.

This brings the whole question back to the proposition of defendants in error, that this provision of law is in defiance of § 1, article 11 of the constitution. Just how the constitution is infracted by this law is not pointed out. This section of the constitution received most ample and elaborate examination by this court in Comm'rs of

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Ottawa Co. *v.* Nelson, 19 Kas. 234, and was under review in Francis *v.* A. T. & S. F. Rld. Co., 19 Kas. 303. To the principles settled in these cases further discussion can add but little. It is obvious that the rate of assessment and valuation of the property of the township under this law is not interfered with in any manner. The rate is uniform. The law makes no discrimination in that respect. No property is assessed too high or too low.

The destination of the proceeds of the taxation is the real point at issue. And on this, the real field of contention, the other side offers nothing to meet the clear reasoning and inferences in 13 Kas. 188, 189. Here the court rightly held the county liable for all the expenses antedating the issue of the bonds. Surely, if the execution of the purposes of a single township can be thus thrown upon the county by legislative direction, much more can the funds arising from county and township taxation within the township on this property, created by this outlay of money of the county, and the credit of the township, be pledged by the act of the legislature to meet the debt of the township so made.

The opinion of the court was delivered by

VALENTINE, J.—The sole question presented to the court for its decision in this case is, the validity of § 7 of ch. 90 of the laws of 1870. The section reads as follows:

"If any county or township tax shall be assessed and collected from any railroad which may have been built in whole or in part in any township which may have subscribed stock as provided in the foregoing sections, all such county and township tax arising from said railroads within said township, shall be set apart and held by the treasurer for the benefit of such township, and applied to the payment of the interest and principal of said bonds, and after the payment thereof, the same shall be added to the school fund of said township; if only a general county or other tax is levied and collected from said railroad in the county, then the township or townships which may have aided in the construction of said road as aforesaid, shall be entitled to have of said tax a fair proportion thereof, to be determined by comparing the length of the road in the township to the whole length in the county." (Laws of 1870, p. 191. See also laws of 1879, p. 253, § 1; Comp. Laws of 1879, pp. 796, 797, § 7; Laws of 1876, p. 215, § 7, and pp. 220, 221, § 10; Comp. Laws 1879, p. 791, § 7, and p. 794, § 10.)

The defendants in error claim that said section 7 is void, because, as they claim, it is in contravention of sections 1 and 4 of art. 11 of the constitution of the state of Kansas. So much of section 1 of art. 11 of the constitution as is necessary to be considered in this case reads as follows:

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"The legislature shall provide for a uniform and equal rate of assessment and taxation."

Said section 4 of art. 11 of the constitution reads as follows:

"No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied."

This litigation has reference to that portion of the county tax of Douglas county and that portion of the township tax of Eudora township which was levied on the railroad property of the St. Louis, Lawrence and Denver R. R. Co., in said Eudora township and county of Douglas. We shall first consider the question raised with reference to the county tax; but what we shall say with reference to the county tax, we think will also have application in principle to the township tax.

This county tax, which is now in litigation, is a portion of the general county tax which was levied on all the taxable property of the county by the county commissioners for general county purposes, under § 83 of the tax law. (Comp. Laws of 1879, p. 956. See also id., p. 275, § 16, sub. 4; id., p. 312, §§ 181 and 1.) This general county tax was levied for "county purposes," for "county charges and expenses," for "current expenses of the county," and no portion of it was levied for the purpose of paying principal or interest on township railroad bonds. And it was levied for said "county purposes" "in pursuance of a law;" and therefore, no portion of it can now be diverted from such purpose or purposes. (Const., art. 11, § 4; The State *v.* Comm'rs of Marion Co., 21 Kas. 419.) Certainly no portion of this tax was levied for the purpose for which the plaintiff now desires to use it.

The tax now in litigation either is or is not a part of the county tax. If it is, then it cannot be diverted from county purposes as before stated. But if it is not, then neither it nor the real county tax is levied on the taxable property of the county or township at "a uniform and equal rate." That is, if it is not a part of the county tax, then all taxable property in the county, except the railroad property, in which this tax was levied, is subject to a county tax, while this railroad property is not subject to any county tax, and no property in the county or township, other than this railroad property, is subject to so high a township railroad bond tax as this railroad property is. While this railroad property is subject to the same township railroad bond tax that other property in the township is, it is also, in addition thereto, subject to another township railroad bond tax equal to the county tax and the township tax levied on other property, and called a county tax and a township tax. Hence, it will be seen that if the tax now in litigation is not a county tax or a part thereof, then neither it nor the real county tax is levied on the taxable property of the county and

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township at "a uniform and equal rate," and hence, both it and the statute attempting to create it must be held to be void. Besides, if it is not a county tax, then both it and the statute attempting to create it, must be held to be void, for the additional reason that it is not levied in pursuance of any law which distinctly states the object of the tax. (Const., art. 11, § 4; A. T. and S. F. Rld. Co. *v.* Woodcock, 18 Kan. 20.) If it is not a county tax, then it is really not levied in pursuance of any law. No statute can be found authorizing the levy of any such tax. And it will not do to call it a county tax for the purpose of giving authority to the county commissioners to levy it under the statutes which authorize the levy of county taxes, and also for the purpose of avoiding that constitutional provision which requires the tax to be imposed at a uniform and equal rate, and then, after the tax is supposed to be legally levied, to say that it is not a county tax for the purpose of avoiding that other constitutional provision which requires that a tax shall be applied only to the object for which it was levied. It either must or must not be a county tax, and in either case the statute attempting to apply it as a township railroad bond fund must be void.

It will be noticed that under the statute in question, the tax in question is never to go into the county fund, or to become any part thereof. The statute provides that it "shall be set apart and held by the treasurer for the benefit of such township, and applied to the payment of the interest and principal of said bonds; and after the payment thereof, the same shall be added to the school fund of said township." That is, the statute in effect provides that the railroad property in the township, belonging to the railroad company to which the bonds were issued, shall be exempt from bearing its just proportion, or any proportion, of the expenses or other indebtedness of the county or township.

This court has intimated that it is possible that the legislature may have the power to exempt from taxation personal property, in addition to that exempted by the constitution. (Ottawa Co. *v.* Nelson, 19 Kas. 237, 238; Francis *v.* A. T. and S. F. Rld. Co., 19 Kas. 311, 312.) But this court has never intended to intimate or decide that real estate may be so exempted. And the bulk of all railroad property is real estate.

It will also be noticed that under the statute in question, no part of the tax in question is ever to go into or become a part of the township fund, although a part of such tax was levied as general township tax and the plaintiff, the National Bank of Lawrence, which now owns the coupons for interest due on said bonds, so construes the statute and commenced this action to compel the county treasurer to pay all such tax collected by him directly to it, the plaintiff. But as substantially the same principles which were

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given with reference to the county tax were also given with reference to the township tax, it is not necessary to say anything further as to the township, in both cases it is a clear attempt on the part of the statute to divert funds, raised by taxation for one object for another object.

The judgment of the court below will be affirmed.

All the justices concurring.

See note, p. 241.

CHICAGO, BURLINGTON AND QUINCY R. R. CO.

v.

THE CITY OF AURORA.

(99 *Illinois Reports*, 205. *May* 14, 1881.)

Under the constitution of 1848, the legislature could properly confer upon a city the power to incur indebtedness and issue its bonds for a corporate purpose, without any vote of the people, but it could go no further. It could not compel a city or incorporated town to incur a debt, unless the legislative department of the city or town saw proper to do so.

Where an act conferring power upon a city council to incur an indebtedness and issue its bonds therefor, is silent in regard to the time when the bonds shall be made payable, and in regard to the terms and conditions upon which they shall be payable, such matters will be left to the city and the person to whom the bonds are to be issued, to be settled, and when agreed to, the city may make the payment of such bonds depend upon conditions mutually assented to.

Where a bond contains two conditions, one authorized by law and good, and the other unauthorized and bad, and the conditions are in their nature severable, the latter may be rejected and the other held good and the bond sustained.

The city of Aurora, under an act of the legislature authorizing it to issue its bonds as a donation to a railway company to secure the location of its machine shops in the city, passed an ordinance for the issue of such bonds, to be conditioned that both the principal and interest should be paid out of moneys to be raised by special tax, to be levied and collected of property in the east division of the city, and that if such a tax could not be legally assessed, the obligees should procure the passage of a law authorizing the levy of such a special tax, and that if any of the conditions were not fulfilled, the bonds should be void. Under this ordinance the city issued her bonds, conditioned as the ordinance required. It was contended by the holder of the bonds, that the condition being void, for the reason the city could not, under the constitution, levy and collect a special tax except over its entire territory, therefore the bonds were payable as though there was no condition: *Held*, that the conditions were such as the city had the right to impose, and it being the intention of the parties that they should not be obligatory if the conditions could not be performed, the bonds were not collectible.

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In the construction of all written contracts, the controlling consideration always is to arrive at the intent of the parties, and in doing this every part of the instrument is to be considered and properly weighed. So the condition of a bond may be considered to explain the obligatory part.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. Hiram H. Cody, Judge, presiding.

Mr. Charles Wheaton for the appellant:

A donation in aid of a railroad company is for a corporate purpose, which the legislature may authorize. Prettyman *v.* Tazewell Co. 19 Ill. 406; Robertson, et al. *v.* City of Rockford, et al. 21 id. 452; Johnson *v.* Stark Co., 24 id. 85; Perkins et al. *v.* Lewis, et al. 24 id. 208; Keithsburg *v.* Frich, 34 id. 405; L. M. & P. Railroad Co. *v.* Morris, 84 id. 410; Supervisors, etc., of Hensley *v.* The People, ex rel., id. 544; Burt et al. *v.* Carbondale, 76 id. 455; Chicago, Burlington and Quincy Railroad Co. *v.* Wilson, 17 id. 123.

As to the legislative control over the funds and revenues of municipal corporations, see Dennis *v.* Maynard et al. 15 Ill. 477; Schofield et al. *v.* Watkins et al. 22 id. 66; Bush *v.* Shipman et al. 4 Scam. 186; Shaw *v.* Dennis, 5 Gilm. 405; The People ex rel. *v.* Power, 25 Ill. 187; Supervisors of Sangamon County *v.* Springfield, 63 id. 66.

An illegal, repugnant or improper condition in a bond will be rejected. Wells *v.* Ferguson, 2 Salk. 463; Mauleverer *v.* Hawxby, 2 Saund. 79.

If the condition of a bond be insensible or void, the bond will be single. Butler *v.* Wigge, 1 Saund. 66; Pullerton *v.* Agnew, 1 Salk. 172; Erlinger *v.* The People, 36 Ill. 458; 7 J. J. Marsh, 192; Conner *v.* Paxson, 1 Blackf. 208; State *v.* Findley, 10 Ohio, 51; Benjamin *v.* McConnel, 4 Gilm. 536.

Mr. A. G. McDole, and Mr. Eugene Canfield, for the appellee:

Under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes against its own wishes. Hessler *v.* Drainage Comrs., 53 Ill. 110; Livingston *v.* Wider, id. 302; Marshall et al. *v.* Silliman et al, 61 id. 218; Harward *v.* St. Clair and Monroe Levee Drainage Co., 51 id. 130; The People ex rel. *v.* Mayor of Chicago, id. 30; Wiley et al. *v.* Silliman et al. 62 id. 170; Ryan *v.* Lynch et al. 68 id. 160; Cairo and St. Louis Railroad Co. *v.* City of Sparta, 77 id. 505; Middleport *v.* Ætna Life Insurance Co., 82 id. 552; Barnes *v.* Town of Lacon, 84 id. 461; Town of Elmwood *v.* Marcy, 92 U. S. 289.

The city, by assuming to issue bonds under the special act of 1867, was not prohibited from issuing them with conditions. Penobscot Railroad Co. *v.* Dunn, 39 Me. 589; Chamberlain *v.* Ashtabula Railroad Co., 15 Ohio St. 225; Ashtabula Railroad Co. *v.*

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Smith, 15 id. 328; Leconic Water Power Co. *v.* Long, 63 Me. 480; Philadelphia Railroad Co. *v.* Hickman, 28 Pa. St. 318; Taylor *v.* Fletcher, 15 Ind. 80.

Mr. Justice Craig delivered the opinion of the Court:

This was an action of debt, brought by the Chicago, Burlington and Quincy Railroad Company, on twelve bonds, of $1000 each, issued by the city of Aurora on the 4th day of December, 1867, payable to Isaac M. Howell and Edward R. Allen, and by them indorsed to the plaintiff.

The $12,000 for which the bonds were issued was a donation by the city of Aurora to the railroad company, in connection with $50,000 donated by the town of Aurora, to be used in the purchase of thirty acres of land in the city of Aurora, upon which the shops of the railroad company were to be, and subsequently were, permanently located. These donations the railroad company required of the town and city as a condition to the permanent location of the shops at that place.

It appears that in the spring of 1867 the town of Aurora had agreed to raise the said sum of $50,000 by taxation, and had issued orders for the amount, and as doubts were entertained as to the legality of the action taken by the town, an act was passed at a special session of the legislature, on the 13th day of June, 1867, confirming and legalizing the proceedings and action of the town in regard thereto. At the time of the passage of this act it was not definitely known whether the $50,000 would be sufficient to meet the required demands to secure the location of the shops, and to provide against such an emergency section 3 of the act declared:

"Section 3. That should the bonds already provided be insufficient to purchase the said estimated thirty acres of land, then the common council of the city of Aurora, in said town of Aurora, are vested with power, and it is hereby made their duty, to borrow such sums of money, or shall issue bonds therefor, with such interest as they may deem proper, not to exceed ten per cent per annum: Provided, however, as between the east and west divisions of said city, the said bonds and the interest thereon shall be chargeable out of the funds belonging to the east division, and it shall be the duty of the common council of said city to keep the said funds of the east division sufficiently large to pay such bonds and the interest thereon, when the same shall mature: Provided, the whole amount of said bonds shall not exceed $15,000."

The bonds for $12,000, involved in this litigation, were issued by the city to Howell and Allen, under and in pursuance of this section of the act. After the bonds had been issued, doubts having arisen in regard to the power of the legislature at the special session under the call of the Governor, to pass section 3 of the act, on the 3d day of March, 1869, the legislature passed another act

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legalizing and confirming the first-named act, and also the action of the city in issuing the bonds.

It is claimed that section 3 of the act of 1867 is invalid, for the reason that it was passed at a special session of the legislature, and it was not included in the Governor's proclamation as one of the subjects upon which that body was called in special session to act. In the view we have taken of the case it will not be necessary to consider this question, and we shall not, therefore, consume time in its discussion.

The bonds upon which the action was brought were in the following form:

"Know all men by these presents, That the city of Aurora is held and firmly bound unto Isaac M. Howell and Edward R. Allen, to pay to said Howell and Allen the sum of $1,000, lawful money of the United States of America, three years after date hereof, with interest at the rate of ten per cent per annum, the first year's interest to be paid on the first day of March, A.D. 1879, and annually thereafter on the first day of March in each year, until this bond is paid. For the payment, well and truly to be made, the said city of Aurora binds itself and its successors firmly by these presents: Provided, however, and these presents are upon these express conditions, that the principal and interest of the above bonds shall be paid out of funds raised by special taxes levied and collected out of property situate and being in the east division of said city of Aurora, and under no circumstances shall they ever become a lien upon property situate in the west division of said city of Aurora: And, provided, further, upon the express condition that both principal and interest of the above shall be paid out of moneys raised by special tax levied and collected upon property in the east division of said city of Aurora only: And, provided, further, conditioned that if such special tax cannot be legally assessed upon the property in said east division under the existing laws, the said Allen and Howell shall secure the passage, by the legislature of the State of Illinois, of a law authorizing the levy and collection of such tax on the property in said east division to pay the above bond, with the interest thereon; and said Allen and Howell receive said bond upon the above conditions, and no other: Provided, that if any of the conditions in the above bond shall not be fulfilled, then and in that case the same shall be null and void, and of no effect.

"Witness, Robinson L. Carter, mayor of said city of Aurora, and the corporate seal thereof, attested by the city clerk this fourth day of December, A. D. 1869.

[CORPORATE SEAL.] "R. L. CARTER,
"Mayor of the City of Aurora.

"Attest: H. F. VAN NORTWICK, City Clerk."

On the back is indorsed:

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"We do hereby assign the within bond to the Chicago, Burlington and Quincy Railroad Company.

"ISAAC M. HOWELL,
"EDWARD R. ALLEN."

The bonds were issued under and by virtue of an ordinance passed by the city of Aurora on the 2d day of December, 1867. The ordinance empowers the mayor to issue the bonds, under the seal of the city, but requires the conditions which were inserted to be incorporated therein, as conditions upon which the city shall only be compelled to pay the same. On behalf of the defendant it is contended, that the conditions contained in the bonds constitute a complete defence to the action, while the plaintiff insists that the conditions are illegal and repugnant to the bonds, and may be rejected and the bonds collected.

While section 3 of the act of 1867, supra, confers the power on the city to incur the indebtedness and issue its bonds to an amount not exceeding $15,000, yet it did not require the city to do so unless it saw proper to incur the liability. It is true, the section declares that "it is hereby made their duty to borrow such sums of money, and issue bonds therefor." That provision in the act was nugatory, as the legislature had no constitutional power to compel a city or incorporated town to incur a debt unless the legislative department of the city saw proper to do so. The legislature could properly confer the power on the city to incur the indebtedness and issue its bonds for a corporate purpose, without a vote of the voters of the city, but it could go no further. After the power had been conferred, it was a matter entirely within the discretion of the city whether it would incur the debt and issue its bonds, or not. The city of Aurora, then, having the power to act or not under the authority conferred by section 3 of the act, if it did act, was it compelled to issue its bonds payable without conditions or any limitations whatever, or had it the right, if it saw proper to issue the bonds, to impose conditions upon which they would be payable? It would seem that there could not be much controversy over this point. The act conferring the power on the city is silent in regard to the time when the bonds shall be payable. It is also silent in regard to the terms and conditions upon which they shall be payable. Such being the case, it would seem to be reasonable that these matters were left for the city and the person to whom the bonds were to be issued, to be settled and determined by contract to be agreed upon by the parties. This court has held, in a number of cases, and the law may be regarded as settled, that where a town is authorized to take stock in a railroad company upon a majority of the legal voters of the town voting in favor of the proposition, the town may, in determining the question of subscription, impose any conditions in respect thereto that it thinks proper. The People *v.* Dutcher, 56 Ill. 144; The People *v.*

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County of Tazewell, 22 id. 147; The People v. Glann, 70 id. 232; Alley v. Adams County, 76 id. 101.

If a town may impose conditions when it has been authorized by a vote to take stock and issue bonds, upon the same principle a city may do the same thing, as they both stand upon the same footing, so far as settling the terms of the contract is concerned. We are, therefore, of opinion that the city of Aurora had the power to issue bonds with or without conditions, as might be agreed upon between the city authorities and the persons to whom the bonds were to be issued and delivered.

But it is said, the conditions incorporated in the bonds in question are illegal, repugnant to the obligatory part of the bonds, and may be rejected, and the instrument stand as a single bond, without conditions. It is doubtless true that under our present constitution the city of Aurora has no power to levy and collect taxes for the payment of the bonds from only such property as is situated in the east division of the city. A tax for a corporate purpose, before it can be enforced, must be uniform, and embrace all the property within the limits of the city. No discrimination whatever can be made. The law was the same under the constitution of 1848. Primm v. City of Belleville, 59 Ill. 142.

But has a court the right, in the construction of these bonds, to disregard the conditions because taxes cannot be collected legally from property situated in the west division of the city? There are cases which hold that the conditions of a bond may be in part void, and in part valid, if they are severable, one from another. If the valid and void conditions are incapable of severance, then the bond would be wholly bad. Such is Erlinger v. The People, 36 Ill. 458, cited by plaintiff. The same principle is announced in State v. Findley, 10 Ohio, 54, cited by plaintiff, where it was held, that a bond given by a county treasurer, the condition of which is that he shall faithfully and impartially discharge all the duties of the office, is a good statutory bond for so much as is prescribed by the statute and comprehended in the condition, even though it be void for the residue. These cases do not, however, reach the question involved here. We do not doubt that at common law or under the statute, where a bond contains two conditions, one authorized by law and good, and the other unauthorized and bad, the latter may be disregarded and rejected, the others held good and the bond sustained.

We have also been referred to Butler v. Wigge, 1 Saunders, 65, and Mauleverer v. Hawxby, 2 id. 78, as authorities to control here. The first case cited was an action on a bond which was conditioned "that if the defendant should stand to and abide by the award of two arbitrators of all actions, etc., so that the award be made on or before the 23d day of January, but if the arbitrators shall not agree upon their award, that then they shall choose and elect an indifferent man, and they shall stand to his final determination and

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judgment, which he shall give and determine on or before the 28th of January, under his hand and seal, that then this obligation shall be void," etc. It was resolved by the court that the condition was good enough, though it was not so properly expressed as it should be, and that the defendant had forfeited his bond by the non-performance of the award of the umpire, and they said that any words by which the intention of the parties can appear are sufficient to make a condition of an obligation, for if the words though they are improper, should be construed void, and not a condition, then in many cases, and perhaps in this very case, the obligation would be single and of force against the defendant, although he has performed the conditions of it according to the intention of the parties.

The case in 2 Saund. was also an action on a bond, which contained this condition: "The condition of this obligation is such, that if the above bound Wm. Markenfield be and appear before our said lord, the King, at Westminster, on Saturday next, after the octave of St. Martin, to answer John Booth of a plea of trespass, . . . then the condition of the obligation to be void and of none effect, or else the same to be in full power and virtue." On demurrer to the declaration it was resolved by the court that the bond was good enough; for the words "then the condition," etc., are void for their absurdity and repugnancy, and no more regard is to be paid to them than if they had been omitted, and they must be taken in the same sense as if the words had been "then this obligation shall be void." While it may be very proper to reject repugnant words, as was done in the case last cited, yet it is manifest such a decision cannot be regarded as an authority to reject the entire condition of such a bond as the one in question.

Other cases of a similar character have been cited, but it will serve no useful purpose to refer to them here. They are predicated on a state of facts so different from the case under consideration, that they cannot control.

The ordinance under which the bonds were issued, which provided that the bonds should contain the conditions which were incorporated therein, was drafted by the attorney of the plaintiff, and he and the obligees in the bonds urged its passage by the city council of Aurora. In addition to this fact the conditions in the bonds were fully known and assented to by the obligees. No unfairness of any sort was practised by the city, but on the other hand, these bonds, with these conditions, were entirely acceptable to the obligees, and the railroad company, for whose benefit the bonds were in the first instance taken.

Under such circumstances, upon what principle can the obligees of the bonds urge that all the conditions shall be rejected, and the bond treated as a single instrument without conditions? It is certainly not right that such a construction should be given, and it will

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not be done unless the law is clear and explicit to that effect, which we do not find to be the case. In the construction of all written contracts, the controlling consideration always is to arrive at the intent of the parties, and in doing this, every part of the instrument is to be considered and properly weighed. The condition of a bond may be considered to explain the obligatory part. 2 Parsons on Contracts, 503; Allen *v.* Morrison, 8 B. and C. 565.

Under this rule there is no ground for rejecting the entire conditions of these bonds. The conditions were inserted for the benefit of the obligor. It is the part of the contract upon which the city relied when the bonds were issued. The conditions may be regarded as the agreement of the obligees, and, as held in Butler *v.* Wigge, supra, should be construed favorably for the advantage of the obligor. In issuing the bonds the city of Aurora, as it had the right to do, relied on the conditions, and if the law is such that they cannot be performed, that is plaintiff's misfortune, for which no blame whatever can attach to the city. It acted in good faith in the matter, entertaining a doubt, perhaps, in regard to its right to collect taxes to pay the bonds from a part, only, of the property of the municipality. The obligees, Allen and Howell, agreed in the bonds to remove the difficulty by procuring the passage of a law which would have that effect. Relying upon this agreement of the obligees, the city issued its bonds, and it cannot be held liable to pay except the conditions are performed.

In People *v.* Dutcher, 56 Ill. 144, under a law authorizing a town to determine, by vote, whether it would subscribe to the capital stock of a railroad company, and require the town supervisor to make the subscription if it should be so voted, it was held, in determining the question of subscription, the town may impose any conditions it may think proper. It is there said: "It is true the law has failed to authorize conditions to be imposed by the voters, but it has not prohibited their imposition. It is not, nor can it be, denied that an individual may or not subscribe to such a corporation, as he may freely choose, and he may impose any condition he desires to such a subscription, and it then is within the free choice of the company whether it will accept the subscription on the conditions. And the General Assembly has left it to the voluntary determination of the voters of the town to say whether they would subscribe for the stock or refuse to do so, by their vote. And if it was a matter of choice whether they would or not make such subscription, then why might they not impose any condition they desired, and when imposed, why should the company be at liberty to compel an unconditional subscription, to which the voters have not and probably never would assent? We have no hesitation in saying that the electors might vote to subscribe on any conditions they might see proper to annex, and that the company can only receive it on the terms prescribed by the vote."

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What is said in the case cited applies here. The city only agreed to pay the bonds on certain conditions therein prescribed, which it had the right to impose, and so long as these conditions have not been performed no liability exists. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

See note, p. 241.

THE TOWN OF SPRINGPORT, Respondent, *v.* THE TEUTONIA SAVINGS BANK, et al., Appellants.

THE SAME, Respondent, *v.* THE GERMAN UPTOWN SAVINGS BANK et al., Appellants.

THE SAME, Respondent, *v.* THE FRANKLIN SAVINGS BANK, Appellant.

(84 New York Reports, 403.)

In actions brought to restrain defendants from transferring, and to compel the cancellation of bonds issued by plaintiff under the act of 1869 (chap. 314, Laws of 1869), authorizing it to subscribe for stock of the C. L. R. R. Co., it appeared that revocations of consents of tax-payers of the town, executed and acknowledged with the same formalities as the consents, were delivered to the assessors while they had the consents before them, and before they had acted upon them, and that the residue were insufficient to constitute the majority required by the statute; also that the assessors disregarded the revocations and wrongfully made and filed the statutory affidavit. *Held*, that the omission to file the revocations did not render them ineffectual; that their delivery made them effectual and withdrew from the assessors the authority to make the affidavit.

Also, *held*, that such omission did not estop the plaintiff; that, assuming the tax-payers, who signed consents, and then revoked them, could be estopped by their acts or omissions, they could not estop the whole body of tax-payers.

Also, *held*, that a tender, before the commencement of the action, of the stock received for the bonds was not necessary; that defendants could not require a tender to themselves, as they were not received from them and they had no title thereto. If they had any right to them (as to which quære), all they could claim was an equitable right of subrogation on cancelling their bonds; if the claim was that the stock should have been surrendered to the company or cancelled, that was a matter between it and plaintiff, and the rights of the latter as against defendants did not depend upon the prior adjustment of the matter.

It seems that in an action against a third party, whose title depends upon a contract claimed by plaintiff to have them rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract of a return of what plaintiff received.

Also, *held*, that the affidavit of the assessors was not conclusive, but only prima facie evidence of the facts therein stated.

(Argued February 8, 1881; decided March 8, 1881.)

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THESE were appeals from judgments of the General Term of the Supreme Court, in the fourth judicial department, entered upon orders made August 17, 1880, modifying by striking out allowances for costs, and affirming, as modified, judgment, entered on reports of a referee.

These actions were brought to have certain bonds, issued by plaintiff to pay for subscriptions for stock of the Cayuga Lake Railroad, authorized by chapter 314, Laws of 1869, as amended by chapter 152, Laws of 1870, delivered up and cancelled, and to restrain defendants from transferring them.

It is reported on a former appeal in 75 N. Y. 398.

The referee found in substance in each case that a majority of the tax-payers of the town of Springport, owning more than one-half of the taxable property of the town, duly executed and acknowledged, consents in writing that the commissioners for said town, appointed under said act, might borrow, on the credit of the town, $100,000, and issue its bonds for the purposes of the act; that after the presentation of the consents to the assessors and before they met to act thereon, revocations in writing, signed by certain of the tax-payers who had signed the consents, and executed and acknowledged in the same manner as the consents, were delivered to the assessors; but that the assessors, being of the opinion that, under the statute, they were not authorized to take cognizance of said revocations, without regard to them, made their affidavit required by statute to authorize the issue of bonds, and filed the same with the consents in the town clerk's office, and that they were filed in the office of the county clerk, but that said revocations were not filed; that rejecting the tax-payers who signed said revocations, there was not a consent in writing of a majority of the tax-payers of the town owning more than one-half of the property assessed; that the railroad commissioners of the town issued $100,000 of bonds to the railroad company, received in exchange that amount of stock, which bonds were purchased by defendants in good faith and for value; that plaintiff demanded a return of the bonds, but did not offer to surrender or transfer the stock.

Jno. E. Parsons for appellant. There was no complete revocation of the consents. (People ex rel. Yawger *v.* Allen, 52 N. Y. 538; Howland *v.* Eldridge, 43 id. 457.) A partnership as between partners may be dissolved, and yet either partner has a continuing right as to strangers to bind his co-partners. (Wardwell *v.* Haight, 2 Barb. 549; Van Eps *v.* Dillaye, 6 id. 244; City Bk. of Brooklyn *v.* McChesney, 20 N. Y. 240.) The authority of an agent may be revoked as between him and his principal, and yet the principal be bound by the agent's subsequent acts in favor of third persons. (Farmers and Mechanics' Bk. *v.* Stickney S. L. R. 161; Lefler *v.* Field, 50 Barb. 407; Edwards *v.* Shafer, 49 id. 291, Morey *v.*

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Webb, 58 N. Y. 350; Beard *v.* Kirk, 11 N. H. 397; Fellows *v.* Hartford & N. Y. S. Co., 38 Conn. 197; Story's Eq., § 470 et seq.) It was necessary that the revocation should be filed. (Town of Venice *v.* Woodruff, 62 N. Y. 462.)

George W. Wingate for receiver appellant. A tax-payer who had once given his consent had no further right in the matter. (People *v.* Mitchell, 35 N. Y. 555.) There is no remedy provided for the correction of error into which the assessors may fall in respect to matters referred to their determination. (Howland *v.* Eldridge, 43 N. Y. 457.) Although the authority of an agent, as between himself and his principal, be revoked, yet the latter is bound by the agent's subsequent acts in favor of third parties, who have not been notified of such revocation. (Farmers and Mechanics' Bank *v.* Stickney, 8 Law, 161; Story's Equity, § 470 et seq.; Storey *v.* Webb, 58 N. Y. 350; Lefler *v.* Field, 50 Barb. 407; Edwards *v.* Schaffer, 49 id. 291.) The failure of the town to tender to the defendants the stock for which these bonds were issued is a bar to the prosecution of the action. (Story's Equity Jur., §§ 1520–1524; Tripp *v.* Cook, 26 Wend. 143, 160; Smedberg *v.* More, id. 238, 247; Hazel *v.* Dunham, 1 Hall, 655, 658; Browne *v.* Howe, 2 Barb. 586, 595; Taylor *v.* Fleet, 4 id. 95, 103; Bench *v.* Sheldon, 14 id. 66, 71; Munn *v.* Worrall, 16 id. 509, 583; Greenleaf *v.* Mumford, 19 Abb. Pr. 469, 476; Stanley *v.* Gadsby, 10 Pet. 521.)

W. F. Cogswell for respondent. The affidavit of the assessors is not conclusive evidence of the fact that a majority of the tax-payers have given their consent to mortgage the town. (People ex rel. Martin *v.* Brown, 55 N. Y. 180; Horton *v.* The Town of Thompson, 71 id. 513; This Plaintiff *v.* These Defendants, 75 N. H. 397–406; The People *v.* Bachullor, 53 N. Y. 128.) The revocations should have been deducted from the consents by the assessors, in determining the question whether the requisite number of consents had been procured. (People ex rel. Yawger *v.* Allen, 52 N. Y. 538; 75 id. 397.) The claim of the defendants that the plaintiff cannot succeed because it did not tender the stock issued by the railroad company to the commissioners at or before the commencement of the action is untenable. (Weismer *v.* Village of Douglas, 64 N. Y. 91; 75 id. 397–407; Schermerhorn *v.* Talman, 14 id. 93, 129, 142.) The certificate was never anything but evidence of the ownership of a proportionate part of the property and franchises of the company. (Arnold *v.* Ruggles, 1 R. I. 105; Angell on Corporations, § 562.) The railroad commissioners are not the town, or even officers of the town, and their acts or omission to act in no way affected it. Horton *v.* Thompson, 71 N. Y. 513.)

RAPALLO, J.—The only points raised on the present appeal which were not expressly passed upon the former appeal (75 N. Y. 397)

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are: that the revocations of the consents of the tax-payers of the town were ineffectual because not filed in the office either of the town or county clerk, and that there was no tender of the stock which had been issued by the railroad company, or of the cancelment of that stock, and no offer either to cancel or surrender that stock when the demand was made for the surrender of the bonds. The objection that the revocations were not filed is untenable. They were executed and acknowledged with the same formalities as the consents, and delivered to the assessors while those officers had the consents before them and before they had acted upon them or passed upon their sufficiency. Their effect was to annul the consents revoked, and the residue being insufficient to constitute the majority required by the statute, the assessors wrongfully made and filed the affidavit, and the condition upon which the power of the railroad commissioners to issue the bonds wholly depended, was not complied with. That condition was the consent of the requisite majority of the tax-payers and not merely the making of the affidavit. The revocations were complete when delivered to the assessors, before they had acted upon the consents. The consents had not been filed when the revocations were delivered, and the filing of the consents after such revocation of them was wrongful. The delivery of the revocations to the assessors was the proper mode of making them effectual, and not the filing of them with the town or county clerk. Their effect was to withdraw from the assessors the authority to make the statutory affidavit and to file it with the consents, thus revoked. On this very ground the proceedings of the assessors in making and filing the affidavit and consents, in disregard of the revocations, were adjudged void and set aside by this court on certiorari in the case of People ex rel. Yawger *v.* Allen et al. Assessors et al. (52 N. Y. 538). The filing of the revocations was not necessary to render them effectual.

The appellants insist, however, that inasmuch as the consents were directed by law to be filed, and they were filed, the revocations ought also to have been filed, so as to give notice to parties who might rely upon the consents on file that they had been revoked; and the omission to file such revocations is relied upon as some sort of estoppel. There is no evidence in this case that any one acted on the faith of the consents on file, but aside from that, the difficulty is that the filing of the affidavit and consents was wholly unauthorized, and the proceeding void; that the tax-payers who gave the consents originally and then revoked them are not the only persons now contesting the validity of the proceeding and of the bonds, nor do they represent all the contestants. Assuming that they could, by their acts or omissions, estop themselves, they could not estop the others. The real contestants are the whole body of tax-payers of the town, embracing those who never gave

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any consents and whose property could not, under the law, be burdened by these bonds against their will, except by the valid consent of the requisite majority; if such consent was not given, these contestants cannot be estopped by the omissions of other persons, acting without their authority, from showing the fact. A voter might do acts which, on general principles applicable to private transactions, ought to estop him from disputing the validity of his own vote, but that would not preclude others from demanding its rejection.

A tender of the stock before the commencement of the action was not necessary. In the first place when the town repudiated the authority of the railroad commissioners to issue the bonds, and demanded of the defendants that they be surrendered, the certificates of the stock were in the hands of the railroad commissioners. Furthermore, the appellants do not distinctly inform us to whom they claim that the stock should have been tendered. If the claim is that it should have been tendered to the defendants, the answer is that it was not received from them and they had no title thereto. If they had any right in respect to it (a point which we do not now decide), the most they could have claimed was an equitable right of subrogation, on cancelling their bonds. If this right existed, the proper mode of protecting it was by a provision in the decree, unless the defendants at an earlier stage consented to surrender the bonds and demanded the subrogation. If the claim is that the stock should have been returned to the railroad company or cancelled, that was a matter between the plaintiff and the company, and the plaintiff's right, as against the defendants, did not depend upon the previous adjustment of that matter. The claim of the plaintiff was that the bonds were absolutely void, and if the result of their being so adjudged was to entitle the railroad company to a cancellation of the stock which it had issued therefor, the company, and not the defendants, was the party to enforce that right. This is not the case of the rescission of a contract, but if it were dependent upon the same principles, the point would not be available. Even in such cases a third party, whose title depends upon a contract claimed to have been rescinded, cannot set up a want of tender by the plaintiff to the original party, of the return of what the plaintiff had received under the original contract. For instance, when a sale of goods is rescinded by the vendor, on the ground of fraud, and he reclaims the goods from a transferee of his vendee, the transferee cannot defend on the ground that the securities received by the vendor from the original vendee have not been tendered back to him. (Kinney *v.* Kiernan, 49 N. Y. 164, 172.) In such a case the title to the securities reverts to the original vendee, on the rescission, but the right to insist upon their return is his, and not that of his transferee of the goods. (Stevens *v.* Austin, 1. Metc. 558,

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Pearse *v.* Pettis, 47 Barb. 276.) Even, therefore, if the principles governing the rescission of contracts were applicable to this case, they would not permit the defendants to set up the right of the railroad company to a return of its stock. There are still further grounds upon which it can be claimed that the town could not obligate itself by any ratification of the transaction, or become liable upon these bonds in any other manner than by means of proceedings strictly conforming to the provisions of the statute.

The point is again urged on this appeal that the affidavit of the assessors was conclusive. This point was clearly involved and adjudicated upon in our former decision. If the affidavit was conclusive, that judgment could not have been rendered, for the bonds could not have been shown to be invalid. Our view was that the statute declared that the affidavit should only be prima facie evidence. The proof of the consents is declared to consist of the affidavit of the assessors. This is the proof required to justify the railroad commissioners in the first instance in issuing the bonds. But, when the act speaks of what shall be the effect of the affidavit as evidence in court, it declares that a certified copy thereof shall be presumptive evidence of the facts therein stated. It surely cannot be that the only reason for thus limiting the effect of the certified copy is to guard against a variance between the original and the copy. Nothing is said about the effect of the original as evidence, and the act seems to contemplate that the genuineness of the signatures would have to be proved in case of contest, if the provision making the affidavit evidence of the fact were not inserted, and it, therefore, makes a certified copy of such affidavit presumptive evidence of the facts therein stated. This limitation of its effect being expressed, we would not be justified in construing the act so as to make the original affidavit conclusive by mere implication, The case of People ex rel. Yawger *v.* Allen et al. Assessors (52 N. Y. 538, 542) draws the distinction between the effect of this affidavit and of the judgment of a county judge under other bonding acts. We can only repeat what was said on the first appeal, that the intent of the statute on which this case depends, appears to have been to lodge the power of authorizing the bonding of the town in the majority of the tax-payers, and not in the assessors.

The judgments should be affirmed, with costs.

All concur, except DANFORTH, J., taking no part.

Judgments affirmed.

See note, p. 241.

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DAVID S. DRAPER

v.

THE TOWN OF SPRINGPORT.

(*Advance Case, U. S. Supreme Court. January* 9, 1882.)

Where a statute authorized a town to subscribe to the capital stock of a railroad and to issue bonds to pay for such subscription, and prescribed that the subscription should be made by commissioners, who were to execute the bonds under their hand and seal, the failure to affix seals to the bonds did not invalidate them, the requirement as to seals being merely directory and a matter of form, not of substance.

Error to the Circuit Court of the United States for the Northern District of New York.

James R. Cox, for plaintiff in error.

William F. Cogswell, for defendant in error.

BRADLEY, J.—The action below was brought by the plaintiff in error against the defendant to recover the amount of certain interest coupons annexed to certain instruments called bonds of the town of Springport, issued in payment of stock of the Cayuga Lake R. R. Co. One defence was that the bonds had no seals affixed to the signatures of the town commissioners. For this defect the court below gave judgment for the defendant, a jury having been waived by the parties. Other defences were set up on the trial, but were overruled by the court. These were: 1st. That on a certiorari (to which the plaintiff was not a party) the proceedings of the town commissioners which resulted in the issue of the bonds were set aside. 2d. That there was no sufficient consent of tax-payers of the town to authorize the commissioners to subscribe for the stock of the railroad company. 3d. That many of those tax-payers who did subscribe revoked their consent before the commissioners acted, which reduced the number of those consenting below that required to give the commissioners power to act.

Without expressing any opinion as to the sufficiency of the defences which were overruled, we are of opinion that the ground on which the court below dismissed the petition was insufficient. It related merely to a matter of form, and not to the substance of the transaction. The statute under which the bonds (so called) were issued was passed April 14, 1869, and was entitled "An act to facilitate the construction of the Cayuga Lake R. R., and to authorize the town of Springport, Cayuga county, to subscribe to the capital stock thereof." The first section authorized the county judge to appoint under his hand and seal three freeholders of the

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town as commissioners to carry into effect the purposes of the act. These commissioners were duly appointed and qualified. The second section of the act was as follows:

"SECTION 2. It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing, not exceeding in amount ten per cent. of the assessed valuation of the real and personal property of said town as shown by the assessment-roll for the year 1868 for said town, at a rate of interest not exceeding seven per cent. for a term not exceeding thirty years, and to execute bonds therefor under their hands and seal.

"The bonds so to be executed may be in such sums and payable at such times and places, not exceeding thirty years, and in such form as the said commissioner or commissioners and their successors may deem expedient; provided, however, that the powers and authority conferred by this section shall only be executed upon the condition that the consent shall first be obtained in writing of the majority of the tax-payers of said town owning more than one-half of the taxable property of said town assessed and appearing upon the assessment-roll of the year 1868, which consent shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged, or proved by a subscribing witness who shall swear, in addition to the ordinary form of affidavits of subscribing witnesses, that the party assenting informed the witness that he knew the contents thereof.

"The proof required to show that a majority of the taxable inhabitants, representing a majority of the taxable property of the town, have given their consent required by this section shall be by the affidavit of the assessors, or a majority of them, of said town, which affidavit, consent, and acknowledgment shall be filed in the town and county clerk's office of the said county, with a copy of the assessment-roll of the year 1868; and it shall be the duty of the said assessors, and they are hereby required, to make such affidavit, whenever the said consent shall be obtained, on or before the 1st day of January, 1870.

"(The time of obtaining consents was extended by the act of April 1, 1870, to April 1, 1871.)

"A certified copy of such affidavit, consent, and acknowledgment shall be presumptive evidence of the facts therein contained, and shall be admitted in any court of this State, or before any judge or justice thereof."

Section 3 authorized the commissioners in their discretion to dispose of the bonds to anybody at not less than par, and directed that the money raised by the sale of bonds should be invested in the stock of the Cayuga Lake R. R. Co., and that the said money should be used and applied in the construction of said railroad, be-

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ginning at the north end as aforesaid, and its building and appurtenances, and for no other purpose whatever.

It was further enacted that the commissioners might subscribe for the stock of the railroad company for the amount consented to, and might purchase the stock, receive certificates, and the town should thereby acquire all the rights and privileges of other stockholders, might participate in meetings of stockholders, and be eligible as directors.

Section 20 authorized the commissioners to exchange the bonds at par and issue them directly to the railroad company, receiving therefor the stock of the company.

On the 23d of March, 1871, the three assessors of the town made an affidavit in accordance with the act, stating the facts necessary to enable the commissioners to proceed.

The commissioners thereupon subscribed for 1,000 shares of the capital stock of the railroad company of $100 each, and issued the bonds in question in payment thereof. The plaintiff purchased the coupons on which the suit was brought in the ordinary course of business, in good faith and for a valuable consideration.

It is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contra-distinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal, and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town, and their seals could have added nothing to the solemnity of the instruments. The fundamental authority contained in the law is found in the first three lines of the second section: "It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing." The commissioners executed this authority in the form allowed by the statute, namely, by a direct purchase of the stock with the bonds issued. They might have sold the bonds for money, and paid the money for the stock. Had they done this, the town would have been liable to pay the money borrowed, even if the obligations given for it had been void. Where the transaction has nothing in it of malum in se, and the parties are not particeps criminis in a violation of law, money had and received by one from the other in good faith may be recovered, even though the security given therefor be void for some technical defect or illegality. This matter was sufficiently discussed in the case of Thomas *v.* City of Richmond, 12 Wall. 354, and was very

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ably considered in The Oneida Bank *v.* The Ontario Bank, 21 N.Y. 496. The fact that the stock was taken directly in exchange for the bonds, instead of selling the latter for money and investing in stock, can make no material difference in the nature of the transaction. It is equally the case of value lawfully received for an innocent obligation, whether valid or invalid, given therefor. If valid, a recovery may be had on it; if invalid, a recovery may be had upon the original consideration.

We cannot agree with the courts of the State that the form of a seal was an essential part of the transaction.

Whether the deviation from the directions of the statute in the form of the obligations may not have the effect of notice to the holder sufficient to allow the other defences to be set up, is a question which it is unnecessary at this time to decide. It may admit of much consideration.

The judgment must be reversed, with directions to award a venire de novo; and it is reversed accordingly.

Reversed.

See note, p. 241.

EX PARTE PETER M. ROWLAND, D. C SHULTZE and R. C. GERMANY.

(*Advance Case, U. S. Supreme Court. January* 23, 1882.)

A writ of mandamus can compel a public officer to do only what the law has made it his duty to do, and cannot issue to one officer to compel another to do his duty.

Hence where the board of commissioners of a county in Alabama, when ordered by mandamus to levy and cause to be collected a tax, held a meeting, levied the tax, ordered the tax collector to collect it, and so far set the machinery of collection in motion that it depended on the tax collector alone to collect it, and, on his failure so to do, informed the governor of the State of the fact, the duties imposed on them by the State statutes were fully performed; an order committing them for contempt for not causing the collection of the tax was coram non judice and void, and a habeas corpus was granted to release them from imprisonment.

Petition for writ of habeas corpus.

John T. Morgan, James L. Pugh, and Thomas H. Watts, for petitioners.

Samuel F. Rice, and A. A. Riley, for the marshal.

WAITE, C. J.—This is an application for a writ of habeas corpus to procure the discharge of Peter M. Rowland, D. C. Shultze, and R. C. Germany from the custody of the marshal of the United

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States for the Middle District of Alabama. The facts, as shown by the return to a rule to show cause heretofore made, may be stated as follows:

On the 31st of December, 1868, the General Assembly of Alabama passed an act to authorize counties, towns, and cities to subscribe to the capital stock of railroad companies. The sections of the act material to the present case are the seventh, eighth, ninth, and twelfth. These are as follows:

"SEC. 7. Be it further enacted, That the court of county commissioners of said counties in which the electors shall have voted in favor of said subscription are hereby authorized and required to levy an assess, in the same manner as is now required by law for the collection of State and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and such other reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax and for issuing said bonds: Provided, That in no case shall such tax exceed one per cent. per annum upon the value of the real and personal property in said county, as yearly assessed and returned to the proper officers.

"SEC. 8. Be it further enacted, That the courts of county commissioners in the various counties in which such subscriptions shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax assessors and tax collectors to assess and collect said tax. Then said courts of county commissioners shall be, and they are hereby invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against said tax collectors and tax assessors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected, and paid over, or misapplied.

"SEC. 9. Be it further enacted, That the tax assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby invested, and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of State and county taxes, and be bound by the same duties, and that the same pains and penalties as are now prescribed by law shall attach to all persons for failing to render a tax list, or for rendering a false list."

"SEC. 12. Be it further enacted, That the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all the provisions of this act, which are not inconsistent with the act itself and the laws of the State and the United States." (Pamph. Laws 1868, pp. 516, 517.)

Under the authority of this act the county of Chambers issued a series of coupon bonds to the Eufaula, Opelika, Oxford and Guntersville R. R. Co. On the 25th of May, 1875, Dix & Co., subjects of

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Spain, recovered a judgment against the county in the Circuit Court of the United States for the Middle District of Alabama, for $2,040.50 and costs on account of unpaid coupons cut from these bonds. Execution was issued on this judgment, and returned "no property found" August 6, 1875. On the 19th of November, 1875, an alternative writ of mandamus was issued from the Circuit Court, on the petition of Dix & Co., directed "to P. M. Rowland, judge of probate of Chambers county, Alabama, and ex officio judge of the court of county commissioners of said county, and J. H. Forman, R. C. Germany, W. C. Grady, and D. C. Shultze, members of said court of county commissioners," commanding them "to levy and assess in accordance with the provisions of said act of the General Assembly . . . such a tax upon the real and personal property in said county of Chambers as will satisfy the said judgment with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is fully satisfied, with interest and costs," or show cause on the 3d of December why they ought not to be required to do so. No cause being shown against the writ, the court, on the 17th of December, issued a peremptory writ with the following command:

"Now, therefore, you, the said P. M. Rowland, judge, as aforesaid, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shultze, members of and composing the court of county commissioners of said county, are hereby commanded forthwith and without delay to levy and assess and cause the collection of, in accordance with the provisions of said act of the General Assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax and cause the same to be collected as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit, and how you shall have executed this writ make known to us, to the judge of this court, at the next term of said court, on the first day of said term, to wit, on the first day in May, A. D. 1876."

On the 24th of April, 1876, the court of county commissioners, at a regular adjourned term, made the following order, which was duly recorded:

"On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Alabama, and executed on the commissioners of said county on the 14th of February, 1876, at the suit of Dix & Co., commanding the commissioners' court of Chambers county to levy a tax for the purpose of paying a judgment in said court in favor of said Dix & Co. against said county, rendered at the May term, 1875, for the sum of two thousand and forty and $\frac{50}{100}$ dollars, and fifty-one dollars costs, and that they report their action in the premises

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to the May term, 1876, of said court. Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers county be levied for the purpose above set forth, and that the tax collector proceed to collect said tax as required by law."

In obedience to the command of the peremptory writ, the commissioners, on the 3d of May, made return that they had levied the tax as required, and accompanied their return with a copy of the order entered to that effect. Nothing more was done in the suit until May 23, 1881, when, on motion of Dix & Co., the return to the peremptory writ was quashed, and a rule entered on the court of county commissioners, "as well as the members thereof, to wit, P. M. Rowland, judge of probate and ex officio judge of the said court of county commissioners, and to J. H. Forman, R. C. Germany, W. J. Grady, and D. C. Shultze, who were members of and together constituted said court of county commissioners" when the peremptory writ of mandamus was served, to appear forthwith and show cause why an attachment should not issue against them and each of them for not obeying the command of the writ. This rule was served on Rowland, Shultze, and Germany on the 29th of May. Forman and Grady had died before the rule was entered. The surviving members of the court of county commissioners made return to the rule on the 16th of July, as follows:

"In this case a rule nisi having, on the 25th day of May, 1881, issued out of said court, commanding P. M. Rowland, as probate judge of Chambers county, Alabama, and ex officio a member of the court of county commissioners in and for said county, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shultze, members of said court of county commissioners, to appear instanter, or as soon as duly served with said rule nisi, and show cause why an attachment should not issue against them and each of them for violating and disregarding the peremptory writ of mandamus heretofore issued and served upon them at the suit of said Dix & Co., the said P. M. Rowland, judge of probate and ex officio a member of said court as aforesaid, begs leave to make the following return, and to show cause under oath as follows why he should not be attached for contempt of the said Circuit Court of the United States:

"He respectfully states that he was at the service of said peremptory writ of mandamus, has ever since been, and is now judge of the court of probate in and for said county of Chambers, and as such ex officio a member of the court of county commissioners in and for said county, and that on the 24th day of April, 1876, the court of county commissioners of said county of Chambers, at a regular term of said court, levied a tax of one-fourth of one per cent. on the assessed value of the real and personal property of the tax-payers of said county of Chambers, to pay off and discharge the

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judgment mentioned in the peremptory writ of mandamus issued and served on him and the members of said court as aforesaid, which said levy is sufficient to pay off and discharge said judgment, together with all interest and costs of suit—the assessed value of the taxable property of said county for said year 1876 being one million six hundred and thirty-one thousand five hundred and sixty-six dollars, and the levy of one-fourth of one per cent. thereon is more than sufficient to pay off and discharge the judgment, together with all interest and costs. A copy of said levy is hereto attached, marked 'Exhibit A,' and made part of this return. Affiant, said P. M. Rowland, gave notice to J. G. Weaver, the then tax collector of said county, and requested him to collect the said one-fourth of one per cent. levied as aforesaid for the purpose aforesaid. Said J. G. Weaver, tax collector as aforesaid, refused to collect said taxes upon the ground that he had previously qualified under the act of the Legislature of Alabama, approved on the 4th day of March, 1876, by giving a bond for the collection of the State and county taxes, for general and not for special purposes; and his successor, J. M. Driver, who is the present tax collector of said county, executed his official bond in the same manner, and has upon the same ground refused to collect said special taxes so levied by said court as aforesaid; and that the said P. M. Rowland notified the governor of Alabama, in the manner and within the time provided by law, of the failure of each of said tax collectors to make a bond for the collection of special taxes. The said P. M. Rowland has done all that the law authorized him to do in relation to the levy and collection of said taxes. Under the laws of Alabama the said P. M. Rowland, as judge of probate of Chambers county and ex officio a member of the court of county commissioners of said county, is simply the presiding officer of the said court of county commissioners, and has no authority to vote as a member of said court, except in cases of a tie, a thing that has not occurred in any matter growing out of the assessment or collection of the said special taxes to pay said judgment as aforesaid. If in anything affiant has been mistaken in his duties in the premises, he is willing to correct his mistakes and do whatever this honorable court may require. At no time has said P. M. Rowland been actuated by any intention to disobey the mandate of this honorable court, and if he has omitted any duty, it has been through mistake of his official duties, and not from any attempt to evade or oppose the authority of this honorable court. All of which is respectfully submitted.

"PETER M. ROWLAND.

"Sworn to and subscribed before me this day of June, 1881. J. W. DIMMICK,

"U. S. Com'r, Mid. Dist. of Ala."

"R. C. Germany and D. C. Shultze show cause as follows why they should not be attached for contempt of said Circuit Court for

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disobedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland: William J. Grady and James H. Forman were members of the court of county commissioners of said county of Chambers on the 24th of April, 1876, and on that day, in obedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland, the said Germany, Shultze, Forman, and Grady, who constituted said court of county commissioners, on said day, at a regular term of said court, levied one-fourth of one per cent. upon the assessed value of the real and personal property of the tax-payers of said county of Chambers, to pay off and discharge the judgment mentioned and described in the peremptory writ of mandamus served on them, together with all the interest due on said judgments, and the costs of suit, and instructed the then tax collector to collect the same. Said levy was sufficient to pay off said judgment, as shown by the return of said P. M. Rowland, and the then tax collector, and his successor in office, the present tax collector of said county, have refused to collect the same, for the reasons set forth in the return of Judge P. M. Rowland, above set forth.

"Some time in the year 1878 J. H. Forman, and some time in the year 1880 William J. Grady, died, and John H. Seroyer and John H. Higgins have been elected as their successors in office and are now members of the court of county commissioners of said county.

"Affiants further state that they are plain men, not learned in the law; that they never knew that there was any other duty devolving on them in relation to the collection of said tax than the levy of a sufficient tax to pay said judgment, with interest and costs of suit, until the service of the rule nisi in the present case.

"Affiants honestly believed that when they had levied said tax and ordered the tax collector to collect the same, they had done all they were required to do, and until the service of the rule nisi they did not know they were required to do anything more; and whatever duty they may have omitted to perform, was omitted through innocent or ignorant mistake of their duties; that they are willing and now offer to perform any and every duty required of them in relation to causing said taxes to be collected. All of which is respectfully submitted.

"D. C. SHULTZE.
"R. C. GERMANY.

"Sworn to and subscribed before me this 14th day of June, 1881. J. W. DIMMICK,
"U. S. Com'r for said Mid. Dist. of Ala."

On the same day the return was filed the court made the following order:

"The respondents then filed their respective answers to said rule, which were considered and held in all respects to be insuf-

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ficient, and to furnish no excuse or exoneration for their failure to obey said writ. Said respondents, P. M. Rowland, D. C. Shultze, and R. C. Germany, are therefore adjudged to be guilty of contempt of this court in relation to said writ, but sentence is hereby suspended, and this cause continued until the next term of the court in order that said respondents may have an opportunity by that time to pay said judgment, with interest and costs; and said respondents are each required to be and appear before this court upon the first day of the next term of this court, to wit, upon Monday, the 7th day of November, A. D. 1881, at 12 o'clock M., to certify obedience to this order, and to receive such sentence as the court may deem meet to pronounce in the premises."

And on the 21st of November the following:

"In this proceeding by attachment for contempt all the parties this day appeared in this court, and were further heard by this court touching the matters of contempt involved in this proceeding. And it appearing to the court that at the last term of this court, to wit, on July 16, 1881, the respondents, the said Rowland, Shultze, and Germany, were fully heard as to the said matters of contempt in disobeying the said peremptory writ of mandamus duly issued out of this court theretofore to them and duly served on them, and that upon said hearing the said respondents were duly and properly adjudged and found by this court to be guilty of contempt of this court in relation to said peremptory writ of mandamus mentioned in this proceeding for contempt and in disobeying said last mentioned writ, but that said respondents were required to appear in this court on the first day of this term to receive such sentence as this court may deem meet to pronounce in the premises; and it is now made further to appear to this court that said respondents have not obeyed said peremptory writ of mandamus, nor certified any such obedience, but still continue to disobey said writ of peremptory mandamus, and that said respondents are guilty of said contempt in disobeying said peremptory writ of mandamus, and that the judgment of said Dix and Company mentioned in that writ, and in respect to which that writ was issued, remains wholly unpaid and unsatisfied and of full force, and that the amount due upon said last mentioned judgment, including the principal and lawful interest thereon and the costs up to this day, is thirty-one hundred and fifty-two dollars:

"It is, therefore, considered, ordered, and adjudged by this court that the said respondents, the said P. M. Rowland, D. C. Shultze, and R. C. Germany, are guilty of said contempt in disobeying as well as in continuing to disobey the said peremptory writ of mandamus, and the order and command of this court therein, and that for said contempt each of respondents is here and now sentenced by this court to pay to the United States, as a fine for his said contempt, the sum of one thousand and eighty-eight dol-

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lars, and to be and to stand imprisoned in the common jail of Montgomery county, in the State of Alabama, until the said fine hereby imposed upon him and all the costs of this proceeding for contempt are paid; that in addition to said fines hereby imposed upon each of said respondents respectively, the sentence of this court also is that said respondents pay all the costs of this proceeding, and stand imprisoned as aforesaid until the whole of said costs shall be paid. But the court further orders and adjudges that if the said judgment of said Dix & Co., under and in respect to which said peremptory writ of mandamus issued, and also the costs of this proceeding, and of the proceedings in which said peremptory mandamus issued, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court before the said fines are paid, then and in that event all further proceedings under said sentence of this court shall thereupon cease, and the said respondents shall thence be discharged from imprisonment under said sentence."

The marshal shows this order as the cause of his imprisonment of the parties named therein, who are the petitioners here.

The single question we have to consider on this application is whether the order of the Circuit Court, made on the 21st of November, is sufficient authority to the marshal for the detention of the persons he holds under it; and that question, as is conceded on both sides, depends entirely on the power of the Circuit Court to require the court of county commissioners to do what its members have been held to be in contempt for not doing. If the command of the peremptory writ of mandamus was in all respects such as the Circuit Court had jurisdiction to make, the proceedings for the contempt are not reviewable here; but if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. (Ex parte Lange, 18 Wall. 165; ex parte Parks, 93 U. S. 22; ex parte Siebold, 100 U. S. 371; ex parte Virginia, Id. 339.)

It is also settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one. In the present case the law made it the duty of the court of county commissioners to levy the tax required to pay the judgment rendered by the Circuit Court. This levy was to be made in the same manner as was required by law for the collection of State and county taxes. Whatever, therefore, the court of county commissioners was bound to do to secure the collection of State and county taxes, the Circuit Court had jurisdiction to require it to do in respect to this special tax. Section 8 also made it the duty of the court of county commissioners to require the

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tax collector to collect the tax, and for that purpose the commissioners were invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against tax collectors and their sureties as were vested in, granted to, or imposed upon the auditor of public accounts, for the amount of taxes not assessed, collected, and paid over, or misapplied. The commissioners had no authority to collect the tax. That duty was, by section 9, put on the tax collector, who was invested with all the rights and remedies and bound by all the duties he had by law for the collection of State and county taxes.

The court of county commissioners, while called a "court," is in fact the board of officers through whom the affairs of the county are managed. The duties of this board, at least so far as this case is concerned, are administrative, not judicial. The county is a body corporate and the court its governing body. The judge of probate is ex officio a member of this body. In performing his duties in that capacity, he acts not as a judge of probate but as county commissioner. The mandamus went against him in this case as commissioner, not as judge. No question arises here as to the power of the courts of the United States to imprison a judge of a State court for what he does, or omits to do, in his judicial capacity. As commissioner, this probate judge was amenable to the authorized process of the courts of the United States in the same manner and to the same extent that his associates were.

The laws of Alabama provide for a tax assessor, a court of county commissioners, a tax collector, and a county treasurer. The services of all these officers are required in a levy, collection and disbursement of taxes. The assessor lists the taxable property in the county and values it for taxation. His list, when made out, constitutes the assessment and is entered by the assessor in a book called the assessment book. When the book is completed by the assessor he delivers it to the probate judge. It is then examined by the probate judge, the county commissioners, county treasurer, and clerk of the Circuit Court, who constitute a board of equalization, of which the probate judge is ex officio chairman. This board equalizes the assessment and corrects any errors that may be discovered. When the equalization has been perfected and all the necessary corrections made, the chairman of the board certifies to that effect on the assessor's book, and the assessment thus becomes the basis of taxation in the county for the current year. The court of county commissioners then levy the amount of county taxes required. The taxes thus levied are to be collected by the tax collector, who is an independent officer and makes his settlements with the county treasurer, and not with the court of county commissioners. He is chargeable with all the taxes levied, but upon his report the commissioners may allow him credit for such as he had been unable to collect and for erroneous assessments.

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The peremptory writ of mandamus was served on the 14th of February, 1876. The first regular meeting of the commissioners thereafter was on the second Monday in April, and at an adjourned day in that meeting the order levying the tax was made. On the 4th of March before, an act was passed by the General Assembly of Alabama (Pamph. Laws 1875–'6, p. 93) to the effect that whenever any county of the State should be authorized by law, or required by the judgment of any court, to levy any tax for any special purpose, otherwise than the taxes authorized by the general revenue laws of the State, the tax collector might execute separate bonds—one for the collection of the taxes levied under the general laws, and one for the collection of taxes levied for special purposes, or in obedience to the requirements of the judgment of a court. If he should give one of the bonds and fail or refuse to give the other, it was made his duty to proceed to collect the taxes for which he gave the bond, and of the probate judge to notify the governor of his failure to give the other. The governor was then to appoint a special tax collector for the collection of the taxes for which the regular tax collector had failed to give bond.

The performance of the duty of the court of county commissioners in respect to the levy of taxes was complete when a valid levy had been made, and all had been done which was necessary to enable the collector to proceed with the collection. The duty to collect rested entirely on the collector. He accounted for his collections to the treasurer, who alone was the custodian of the moneys of the county, and paid them out to the parties entitled thereto, on proper vouchers. If the collector failed to perform his duty he could be compelled by mandamus to do what was required of him by law, but it is nowhere made the duty of the court of county commissioners to institute any such proceeding. As the duty of collection was one the tax collector owed to the judgment creditor as well as the commissioners, we see no reason why the creditor could not himself apply for the necessary writ. If the collector made collections which he failed to pay over, he and his sureties could be proceeded against summarily for the moneys in his hands. So, too, if he failed by his own fault or neglect to make his collections, he and his sureties would undoubtedly be liable to an action on that account; but we have been referred to no statute which made it the official duty of the court of county commissioners or the auditor of public accounts to bring such an action. Under the law as it stood when the bonds sued on were issued, the auditor could obtain a summary judgment for certain penalties imposed by law upon a tax collector for the non-performance of his duties, but it was not made his absolute duty to institute the necessary proceedings for that purpose; and, besides, the writ in this case does not require the commissioners to do any such thing.

We proceed now to the consideration of the return of the com-

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missioners to the rule upon them to show cause why they should not be attached for disregarding the writ. Their statements in the return have not been controverted, and are consequently to be taken as true. While the return to the mandamus itself was quashed, the return to the rule stands in the place of a return to the writ for all the purposes of this proceeding. The command of the writ was that the commissioners levy, assess, and cause to be collected the necessary tax. They return that they did levy the tax and order its collection by the tax collector. It is true that while the writ ordered the tax to be levied on the real and personal property in the county, the levy as ordered was on the real and personal property of the county. Clearly there can be no difference between what was done and what was ordered to be done. A tax was levied, and that implies a levy on property which was in law taxable. The property belonging to the county was exempt. It was so expressly provided by law. (Pamph. Laws 1886, p. 298, sec. 3; Id. 1875–'6, p. 44, sec. 2, par. 2.) Consequently the return that a tax had been levied, which the tax collector was directed to collect, necessarily implied that the levy was made on the taxable property in the county, and the Circuit Court could not have understood otherwise. It is, then, to be taken as a fact that the levy which was commanded was actually made. The levy was made on the assessment for the year 1876, but as no other assessment was mentioned in the writ, the presumption clearly is that no other was intended. It follows, therefore, that the fine, for the non-payment of which the commissioners are now held in custody, must have been imposed because they failed to cause the tax which was levied to be collected. The orders themselves indicate as much on their face, for in the first the sentence was delayed after the commissioners were adjudged to be in contempt, to give them time to pay the judgment, and in the second, the fine is to be remitted and the contempt purged if the judgment shall be paid.

The case, then, clearly presents itself to us as a proceeding against the commissioners for contempt in not causing the tax to be collected after they had done all they were required to do to charge the tax collector with the duty of making the collection. This we cannot but think was beyond the jurisdiction of the Circuit Court. The duty of the commissioners in respect to the collection of the tax is performed when they have done all that is necessary to authorize a qualified tax collector to enter upon his work under the law. The original act of 1868 made it the duty of the collector of general taxes to collect the special tax as he did the others. If the act of 1876, which permitted the regularly elected collector to disqualify himself from collecting the special tax by not giving the new bond, was unconstitutional as to Dix & Co.'s coupons, which the Supreme Court of the State is reported to have decided recently in the case of Edwards *v.* Williamson, the judgment creditors

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might, by proceedings in mandamus against him, have required that he make the collection, notwithstanding the change in the law; but we are referred to no statute which makes it the duty of the court of county commissioners to test that question in that way or any other. As the law stood on its face the commissioners and the probate judge had performed their duty when the governor was informed, in the proper way, of the failure of the tax collector to give his bond for the collection of the special tax. Whatever it is within the power of the creditor to compel the tax collector to do without the intervention of the court of commissioners, the commissioners are not required by the writ against them to do. Their whole duty in respect to the collection of the tax is performed when they have so far set the machinery of collection in motion that others are required to keep it going. Their obligations in this respect end where those of another public officer begin. They cannot be required by mandamus to compel another officer to do his duty, if, without their intervention, the moving party can himself accomplish the same result. It is true that under section 12 general powers are conferred on the commissioners to carry out the provisions of the bonding act, but this does not change the rule of their liability to the bondholder in the particular now under consideration. The general principle which governs proceedings by mandamus is that whatever can be done without the employment of that extraordinary remedy may not be done with it. It only lies when there is practically no other remedy. As a necessary consequence the writ must issue directly against him whose duty it is to do the thing which the parties seek to have done; for as was said in Reg. *v.* Mayor of Derby, 2 Salk. 436, "it is absurd that the writ should be directed to one person to command another." The question here is whether it was the duty of the tax collector under the law to collect the special tax which the commissioners had levied. That question the creditor could have had determined in a direct proceeding against the collector without the help of the commissioners. It follows that if the command of the writ against the commissioners was what the Circuit Court has construed it to be, it was in excess of the jurisdiction of the court, and consequently void. If the command of the writ was in excess of jurisdiction, so necessarily were the proceedings for contempt in not obeying. We are led, therefore, to the conclusion that the order of the court under which the marshal holds the petitioners in custody was a nullity, and that a writ of habeas corpus should issue as prayed for, unless the parties are willing that an order of discharge shall be entered without further proceedings.

It is consequently so ordered.

Granted.

See note, p. 241.

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EX PARTE THE STATE OF ALABAMA, PETITIONER.

The writ asked for in this case is refused, as the relief sought can be had under the application of Rowland and others, just decided. Denied.

THE STATE, EX RELATIONE BROWN,

v.

C. AND L. R. R. Co.

(13 *Shand's Reports*, 290. *November Term*, 1879.)

A judgment upon the merits dismissing an action brought by certain tax-payers of a county against the county commissioners to enjoin the issue by them of certain railroad aid bonds, is an estoppel to a subsequent action after the bonds have been issued, brought in the name of the State upon the relation of certain other tax-payers of the same county, against the county commissioners, the railroad company and purchasers of the bonds, to have the bonds adjudged illegal and void.

A county having issued certain railroad aid bonds after a decree of the court had determined that the county had the power to do so, all persons purchasing such bonds become privies to the decree, and may rely upon its estoppels. Gelpcke *v.* City of Dubuque, 1 Wall. 175, referred to.

A statement in State, ex rel. Harris *v.* Robertson, county treasurer, MS. Dec., Nov., 1877, explained; and the dissenting opinion in Glenn *v.* County Commissioners, 6 S. C. 412, approved.

In our state constitution there is no restriction which deprives the legislature of the power to authorize counties to incur obligations and issue bonds for their payment.

Before PRESSLEY, J., York, March, 1879.

For a proper understanding of this case, it will be well to read the case of Glenn *v.* County Commissioners of York, 6 S. C. 412. In that case, Glenn and others, tax-payers of the county of York, brought their action against the county commissioners of York, to enjoin the issue of $100,000 in county bonds to pay for a subscription made by the commissioners for the county to the Chester and Lenoir Narrow Gauge R. R. Co., without any vote by the people. The defendants there admitted the subscription, and that the bonds were about to be issued, but claimed the power to make such subscription and issue such bonds under section 11 of the act incorporating such railroad company, (15 Stat. 395,) which reads as follows:

"SECTION 11. That it shall be lawful for any county or town interested in the construction of the said Chester and Lenoir railroad to subscribe to the capital stock of said company, or of any

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company with which it may consolidate or unite, such sum, and to be payable in such manner as the people, or proper authorities of such county or town shall deem best, determine and authorize; and in all meetings of stockholders, the county commissioners of the respective counties, and the town councils of the respective towns, shall appoint some person to represent the stock of their respective counties or towns: provided, that the property of said railroad company, situated in this state, shall be subject to taxation during the existence of their charter."

The Circuit judge held that the commissioners had the power to subscribe and to issue bonds, and dismissed the complaint, with costs. The plaintiffs appealed, and in 1874 the appeal was dismissed by a majority of the court, but no opinion filed, and Willard, A. J., dissenting.

The present case was instituted in April, 1878, in the name of the State of South Carolina upon the relation of F. H. Brown and sixteen others, tax-payers of York county, against the Chester and Lenoir R. R. Co., the county of York, the commissioners of York county and several other defendants, then owning or holding bonds of the county of York, issued by the commissioners of York county to pay for subscription of that county to the capital stock of the Chester and Lenoir R. R. Co. The complaint alleged that there was no authority for the subscription or the issue of bonds, and that they were null and void; and it prayed that the bonds might be adjudged illegal and void, and the defendants required to deliver them up for cancellation. The defendants, in their several answers, claimed that the bonds were legal, and protected by the decision in the former case. There were other issues involved, but they were suspended to await the single question, are the bonds valid? Trial was had on the pleadings in this case, and the record in Glenn *v.* County Commissioners. From the pleadings here it appeared that all of the bonds in existence had passed out of the hands of the county of York, and also of the railroad company, and were held by purchasers for value, and as collateral security for an obligation of the company.

The Circuit decree is as follows:

This case was heard by me on the pleadings, which, together with the acts of the legislature and the case of Glenn and others, hereafter referred to, sufficiently show the facts and issues involved. I have always regarded the said case of Glenn et al. *v.* County Commissioners, as a final decision of the whole matter now involved. The Circuit judge certainly decided it upon its merits, and the motion to reverse his judgment was dismissed by the majority of the appeal court, from with Willard, A. J., dissented, and, assuming that the action of the majority confirmed the construction of the statute made by the Circuit judge, he fully states the reasons for his dissent.

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In my opinion the terms of the act clearly fall within the class of cases of which the word "or" is construed to mean "and." Any other construction would make it confer power either upon the "people" or upon the proper "authorities" to make the subscription in question. But "the people" could not possibly exercise such a power without the concurrence of "the proper authorities," unless some other agency were expressly provided for that purpose. No such agency was provided in this case. It is therefore plain that the act intended that the people and the proper authorities should not act in the alternative, but that both should act in concurrence.

Since the case of Glenn et al. *v.* County Commissioners was decided, matters have transpired of which courts are bound to take notice, and which change very materially the aspect of the case. Three general elections have taken place, at which the people of York county, if the majority had so desired, might have elected county commissioners who would have surrendered, or offered to surrender to the railroad company the stock which had been issued to the county in exchange for the bonds which are again called in question. But no such action was taken, and the commissioners still hold the said stock as the property of the county, and do not in their answer even now offer to surrender it. The act prescribes no special mode by which the proper authorities were to ascertain the sense of the people. And it is now too late to do that by a vote; the road has been built through the county and is in daily operation; the people who are enjoying its conveniences and advantages may now very willingly vote to be freed from a tax to pay for it, and that without any danger of being thereby deprived of its benefits; their wish in the matter at this time is not a question material to the proper decision of this case; the true issue is, whether or not the majority approved of the subscription at the time it was made; that could not be settled satisfactorily either by a vote now, or by the testimony of any number of witnesses, merely stating their opinion that the people would have voted for or against the said subscription; what they have done or failed to do at the general elections heretofore held, is the only test now proper.

I therefore hold that their long acquiescence has ratified the action of their county commissioners.

Further, as no clause of our state constitution prohibits the legislature from authorizing "the proper authorities of counties or of towns" to make such subscriptions, even without any vote or other concurrence by the people, it could have conferred that power in the said act if it so willed. Not having previously conferred it, such subscription made in excess of authority, or even without authority, might thereafter be ratified by the legislature. If so, then the act of March 5th, 1875, which authorizes a special tax in

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York county to retire the bonds which had been so issued, is a clear recognition of their validity, and, consequently, cures all excess of authority by the commissioners.

I cannot assume that the said act was passed by the legislature without its having had full knowledge of all the facts of the case. The appeal court had previously rendered its decision in the said case of Glenn et al. *v.* County Commissioners; and in that case the excess of authority by the said commissioners was fully and plainly set forth and discussed. It was matter of public notoriety, freely discussed everywhere in the state, and must have been well known not only to the members of the legislature from York county, but to the assembly generally. Besides it was the duty of the legislature, before passing such an act, to inquire strictly into the facts of the case. And in the absence of all proof to the contrary, I am bound to presume that such duty was properly performed. Other matters, subsequently to the said act, all concur to show acquiescence by the people, and further confirmation by the legislature. Even the act of 1878, which suspends for a year the said act of 1875, makes it manifest that until such suspension the commissioners had been collecting the tax which the said act of 1875 authorized; and after such suspension, the tax act of 1875 still permitted the levy of a tax to pay the coupons on the bonds in question. Whatever, therefore, may be the force of the decision in the said case of Glenn and others, I hold that, without it, matters have since transpired, which, taken altogether, clearly establish the validity of the said bonds. And I consequently adjudge and deem that the complaint in this case be dismissed, with costs.

From this decree the plaintiffs appealed upon the following grounds:

1. Because his Honor erred in deciding that the case of Glenn et al. *v.* County Commissioners, was a final decision of the matters involved in this action.

2. Because his Honor erred in deciding that the people of York county had ever, in any manner or form, by any free action upon their part, approved, acquiesced in, or ratified the subscription made to said railroad company, without their consent and against their will. The fact being that said people have, at all times and under all circumstances, as far as it was in their power, protested against the said subscription, and denied that it was binding upon them, as the plaintiff is ready to prove.

3. Because his Honor erred in deciding that the legislature of the state had the constitutional authority to give validity by way of ratification to the action of the county commissioners in making the subscription and issuing the bonds in question against the will of the people.

4. Because his Honor erred in deciding that the legislature of the state have ever, by any act or acts, ratified or made valid the

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said subscription by the county commissioners or the said bonds after they were issued.

5. Because his Honor erred in deciding that the said bonds are valid and binding obligations of the county of York.

6. Because his Honor erred in dismissing the plaintiff's complaint.

7. Because, it is respectfully submitted, his Honor should have decided that the said bonds were issued absolutely without authority and are void, and should have granted the relief prayed for in the complaint.

8. Because his Honor should have decided that Section 11 of the act of February 26th, 1873, was in violation of Section 20 of Article II. of the constitution of the state, and had not the force of law.

9. Because his Honor should have decided that, inasmuch as the people of York county had not accepted the privileges named in Section 11 of the act of February 26th, 1873, they could not give validity to the void action of the county commissioners in making the subscription and issuing the bonds in question by acquiescence, or other alleged acts of ratification on their part.

10. Because, it is respectfully submitted, his Honor erred in deciding the cause on questions of fact that were reserved by written agreement of counsel.

The appeal was heard at the April Term, 1879.

Messrs. LeConte and Patterson & Gaston, for appellants.

The bonds were issued absolutely without authority. The act (15 Stat. 393) conferred no authority upon the commissioners to subscribe or issue bonds. See dissenting opinion and argument for appellant in 6 S. C. 412. The legislature had no power to enforce obligations upon the county of York, except upon consent of her people. Counties are only agencies of the general government to aid in the administration of general laws in their several districts. Dillon, Mun. Corp. § 10. There is no such thing as a county government. There is nothing in Article IV., Section 19 of our constitution, which contradicts this fundamental principle. The term jurisdiction carries the meaning of the power to administer, not to make laws. The general assembly must determine the necessity; the county have jurisdiction to carry out and administer. Compare with Article IX., Sect. 9. Again, Counties are not named in Article IX., Section 9. Here is contemporaneous exposition. See the several acts relating to county commissioners. Counties are only sub-divisions of the state, created as instrumentalities of the state government, to subserve the administrations of the general laws of the state in their particular localities. The constitution does not seem to contemplate their incorporation. Art. II., § 3; Art. IX., § 9. But having a corporate form, advantage is taken of this to endow them with powers and privileges which are private as respects the rest of the state, although public in respect of the

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inhabitants of the county. It is upon this that the questions to which this argument is directed must arise. As respects the acquisition and enjoyment of such special powers and privileges, what are the relations which the county bears to the state, and what control has the state legislature over it? As to such matters, the county corporation is upon the same footing with a municipal corporation fully developed, and indeed a private corporation. The legislature has no compulsory power over it, and can do no more than to grant the power or privilege, subject to the right of the corporation to accept or reject it at its will. Cooley on Const. Lim. *231; 28 Mich. 228; 13 Wis. 37; 29 Wis. 413; 51 Ill. 17; 2 Am. R. 278; 53 N. Y. 128; 4 Wheat. 694. It is said that all this is met by State *v.* Charleston, 10 Rich. 491; so it is as to cities or towns, which possess a complete representative government. But in the case of a county, who represents the corporation? Certainly not the commissioners who are administrative officers of the state, not of the county. The people of a county have no one to act for them, and must speak for themselves. It is a mockery of free government to say that a legislature representing thirty-three counties, can, at will, dispose of the property or fortunes of the people of York county, either directly or indirectly, by accepting, as the will of the people, the consent of a board of petty officials elected to fulfill certain subordinate functions, as the agents of the state in the county. Locke's Essay on Gov., § 142. Nor can they raise taxes upon the property of the people without the consent of the people.

If the legislature had, itself, the constitutional power to determine this subscription and authorize these bonds without regard to the will of the people of York, still it could not delegate this power without restriction to be exercised by subordinate functionaries, appointed for purposes wholly foreign to the exercise of such powers. 6 S. C. 436; Cooley on Const. Lim. *116, *119.

Section 11 of act, (15 Stat. 393,) is in violation of Article II. section 20 of the constitution.

The bonds being absolutely void, have not acquired validity by reason of any matter subsequent to their issue. Not by acts of the legislature. 15 Stat. 865; 16 Stat. 485. These acts are not validating acts. 4 Otto, 269. Could it be supposed that a legislature which prohibited county commissioners from building a poor-house, without a vote of the people (15 Stat. 989) would have stultified itself by sanctioning action here? As to purpose of second act, see House Journal, 1877–78. Not having power to authorize, the legislature could not validate. Cooley on Const. Lim. *381; 13 Wis. 37. The bonds did not acquire validity under judgment in Glenn *v.* County Commissioners. The plaintiff here was neither party nor represented. 2 Dill. on Mun. Corp.; 2 Duer, 664; 18 N. Y. 115; 23 N. Y. 318; 26 Mich. 264; 2 Bligh (H. L.) N. R. 312; 10 Rich. 491. Glenn and his associates were individual tax-payers, suing on

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their own account alone. If capable of suing, they represented only themselves. 5 Rich. Eq. 342; 11 Gray, 436; Lleady, 610; 17 How. 130. See remarks in State, ex rel. Harris *v.* Robertson, MS., Dec. 1877. The order of the Supreme Court in the Glenn case does not show that it was final. It does not appear that issues were decided.

The bonds have not become valid by reason of any act or thing done by the people of York county. The acquiescence of the people of York county was specially reserved, and was not before Judge Pressley at all. We were prepared to show that everything had been done in protest which a people could do. Only two elections were afterwards held, and if stock was held up to filing of complaint, the action of commissioners could not estop the people. 10 Wall. 676. If the bonds were void, the doctrine of estoppel can have no application. Dill. on Mun. Bonds, 52, 53; 20 Wall. 655. But defendants knowing how the bonds were issued, cannot claim the benefit of an estoppel; nor could claim of bona fide holder avail when there is total absence of authority to issue.

Mr. J. F. Hart, contra.

Both state and relators are estopped from bringing this action. The state is estopped. 15 Stat. 395; 6 S. C. 412; 15 Stat. 865, § 7; 16 Stat. 485; and in connection with the fact that York and Chester were the only counties authorized by law to levy a tax to retire bonds issued in aid of railroads, 16 Stat. 288 and 797. The state is estopped. 10 Rich. 499. The relators here are also estopped. In using the word "parties" in Harris *v.* Robertson, the court meant to include privies. If not, then who were the parties in the Glenn case? As the plaintiffs there were tax-payers, then all tax-payers are bound. Code, § 142. Otherwise, every taxpayer might bring his separate action. And all people of York are bound, because the county commissioners were parties. The judgment there bound the county and all people in it. 10 S. C. 141; 7 Otto, 376; 29 Iowa, 197; Freem. on Judg., §§ 174, 176, 178.

If plaintiffs are not estopped, then it is submitted that original subscription and issue of bonds were authorized. Const., Art. IV., § 19; Art. IX., § 8; 1 Dill. on Mun. Corp. 233. Such was the intent of the legislation. 15 Stat. 865; 16 Stat. 288, 485, 797. This is contemporaneous legislation, to which we may resort in cases of doubt. Pot. Dwar. 136, 189 and note; 191 and note; 5 Cranch. 1. If "or" means "and," as intimated in the Circuit decree, the execution of the bonds by commissioners alone would make them valid. 5 Wall. 784. If power was not fully conferred in original acts, defect has been cured by subsequent legislation. 10 Rich. 494; 16 Wall. 663; Dill on Mun. Corp., §§ 46, 424; 2 Rob. (La.) 209. If these acts do not purport to be validating acts, it is of no consequence—the form is not material. 7 Wall. 619; 22 Wall. 75; 95 U. S. 653; 121 Mass. 460; 76 N. C. 489; 66 N. Y. 129; 57 N. Y. 177; 5 Wall. 203.

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The act of the commissioners has been ratified by the people of York, as held by the Circuit decree from the pleadings, the statutes of the state and other matters within judicial cognizance. 19 N. Y. 218; 17 N. Y. 453; 24 Ill. 90; 5 Wall. 772; Dill. on Mun. Corp., § 385.

The legislature has recognized, the courts sanctioned, and the people ratified these bonds. If Glenn *v.* County Commissioners was wrong, it cannot now be reserved so as to affect these bonds. 22 Iowa, 11; 8 Wall. 584; 1 Wall. 175; 16 How. 432; 3 Wall. 330. If all these positions are erroneous, neither the county of York, nor its people can repudiate the contract with the defendant railroad company while holding its stock. Sedg. on Const. Law, 90; 19 Wall. 678.

On September 19th, 1879, this court passed the following order:

It is ordered that the above stated case be re-argued at the next term of this court. The attention of counsel is especially directed to the following questions, some of which were not fully noticed in the former argument, viz.:

1. Does the constitution of 1868 constitute the several counties of this state corporations?

2. If it does not, has the general assembly power to do so?

3. Has the general assembly the power to confer upon the board of county commissioners the right to issue negotiable bonds for the purpose of aiding in the construction of a railroad?

Messrs. Simonton & Barker, for the affirmative.

The constitution has either created counties corporations, or contemplates their creation into corporations by the general assembly. Const.. Art. IV., § 19. This recognizes the county as a unit, distinct from the state. Article IX., section 8, shows that counties are or can be made corporations. Compare this with the next succeeding section. The eighth section speaks for the present; the ninth commands for the future.

It is claimed, however, from Art. II., § 3, that there is no change from our old judicial districts, except in name. The last sentence in the same section says that each county shall constitute an election district. Up to that time, election and judicial districts were distinct, in fact, and in their history.

In order to explain our position we must go into a brief examination of the history of the state.

From the earliest settlement of South Carolina down to the adoption of the constitution of 1868, the entire government of the commonwealth was in the hands of the legislature. With the exception of a few incorporated towns, the whole municipal administration was exercised and supervised directly by the general assembly. All the taxes were levied by that body. The whole proceeds of taxation went into the state treasury. Every dollar,

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for every purpose, general or special, from the building of the state-house to the erection of a county jail, was appropriated and expended under an act of assembly. From the most petty item of expenditure—the costs of a constable for serving a warrant—to the millions expended in internal improvements, the appropriation had to be made by a bill originating in the house of representatives, and passed with all the formalities required by the constitution. There were no district taxes; no district funds; no district purposes, in which the people of the district had any exclusive control; indeed, had any voice whatsoever. An election district sent its senator and representatives to Columbia, and furnished its taxes. But, except in the share which these representatives had in the vote of their respective houses, the district had no voice or claim in the disbursement of the money they raised. For very many years, indeed, down to a period not very distant, every official in the state was elected or appointed by the general assembly—governor, judges, clerks, sheriffs, ordinaries, tax collectors, justices of the peace, magistrates, managers of election, commissioners of the poor, of public buildings, of free schools, of roads, bridges, and ferries. And, notwithstanding the spread of democratic doctrines throughout the Union, and in spite of many efforts to the contrary, the majority of these offices continued to be filled by the general assembly until the new constitution of 1868 was adopted. The local officers, especially the commissioners of the poor, of public buildings, of free schools, of roads, bridges and ferries, appointed by, were directly responsible to the legislature—made their annual reports to, and got their instructions from that body. Annually the comptroller-general reported their accounts, and the accounts of every public servant in the districts, to the general assembly; and on such report, and upon reference to and an examination by committees of each house—an examination going into every item of charge—the accounts which were allowed were paid by the state treasurer, after an appropriation for that purpose. The state was a thoroughly centralized government: and, with the exception of a few towns and villages, there was no form of municipal government—distinct, self-supporting—within the limits of the state.

There have been in South Carolina three kinds of territorial divisions—counties, election districts and judicial districts.

Originally there was, apparently for convenience in territorial designation, counties, such as Craven county, Berkeley county, Granville county, and Colleton county, with outlying precincts, such as Ninety-six, the Cheraws, Camden, and so forth. Afterwards, as the up-country became more settled, these outlying precincts were sub-divided into counties, bearing, for the most part, the same names they now do—Abbeville, Fairfield, Chester, and so forth. 1 Brevard Dig. 253.

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The judicial districts were formed for the more speedy and convenient trial of causes in the Court of Common Pleas and General Sessions.

Originally, the only court in the province was held at Charles Town. This proving the cause of great inconvenience, circuits were established, and the province was divided into precincts or districts. Brevard, 219. Charleston precinct embraced all the territory between the Santee, Combahee and the sea; Beaufort precinct, all the territory between the Combahee and Savannah rivers and the sea; Orangeburg, between the Savannah, Santee, Congaree and Broad rivers, extending beyond Newberry. 1 Brevard Dig. 256. In 1798, these precincts or districts were sub-divided into smaller districts, following very much the boundaries of the counties which had been previously fixed, but not so absolutely or in every instance. For instance, Sumter district was composed of Claremont, Clarendon and Salem counties; Kershaw district comprehended Richland and Kershaw counties; Orangeburg district comprehended Orangeburg, Lexington and Newberry counties; Georgetown district embraced Williamsburg, Kingston and Georgetown. The purpose of this act was declared to be a more easy, certain and uniform system of judicature, by the establishment of courts under proper regulations in districts of convenient dimensions. This division, however, was in no sense political or municipal. The districts were not organized—had no powers and no duties. They only formed the boundary lines within which process from a particular court-house ran.

The third division of the state was into election districts. These, in some instances, covered the same territory as the judicial districts. In others, as in Charleston, Beaufort, Colleton, Georgetown, Sumter, Horry and Orangeburg, they were widely different. Charleston judicial district had, within its limits, ten election districts, distinct, separate, independent of the judicial district. Georgetown and Horry each had one and a half, dividing All Saints between them. Some election districts, although they had the same boundaries as the judicial district, had distinct names—Lexington district was represented in the legislature as Saxe Gotha; Marion as Liberty. Each of the election districts had its separate tax collector, and they approached more nearly to our present idea of a county than any other division.

For very many years a political struggle was waged in the state, the object of which was to make the judicial districts and the election districts coterminous and the same. The war produced a change of power in the state, and the convention of 1865 nearly ended the struggle by making in all but one instance the desired change. Every judicial district in the state, but one, was made an election district; and in 1868, by the absorption of the district of Berkeley into Charleston, the entire change was effected.

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The constitution of 1868 made all the judicial districts counties, gave to the legislature the right under certain limitations to make counties at its pleasure, and declared each county, existing and to exist, an election district.

The new county system had machinery provided for it, whereby the local concerns of each political sub-division should be administered by a board elected by and representing the county, specially charged with its local concerns of every description, and capable of possessing and of using power of taxation over the county, and of thus creating a county fund. This constitution was made by men who had had a wider experience than in South Carolina. They came from states in which counties had been in the habit of discharging some of the functions of government. When they used the word county, they meant something more than mere territory. With the abolition of the name district, a peculiarity in this state, was effected a wide revolution. Instead of its centralized state government, South Carolina was placed on the plane of what Mr. Cooley calls the American system, which is "one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authority, and general affairs only by the central authority." Const. L. 189. The result is, that in every matter—in all expenses incurred in the care of the poor; erection and repair of public buildings; payment of juries, witnesses, constables; all expenses of court; salaries of county officers—the county is responsible, and provides for them out of the county funds alone. This was the practical operation, under the constitution, in every matter but the funds for educational purposes. And since the adoption of the last constitutional amendment, this has been brought within the general system, so that every dollar used for county purposes is raised from taxes levied upon and collected in the county, and is expended in the county by the county officers, each county raising and paying its own expenses, and the expenses of no other county. This revolution in the internal administration of the state forbids the idea that the counties of the constitution of 1868 are nothing more than the scraps of territory, called under the former constitutions, judicial districts, with no functions whatsoever.

Under second question, counsel cited Gen. Stat. 145; 19 Wall. 673; 7 Otto, 376; Cooley on Const. Lim. 87, 173, 191; 15 N. Y. 543; 27 Vt. 142; 4 Wheat. 316; 16 Wall. 676; 13 Ill. 30; Dillon on Mun. Corp., § 10, a.

Under third question, counsel cited 4 Rich. 382; 1 Spears, 218; 8 Leigh, 120; 15 Conn. 475; 9 Hump. 252; Dillon on Mun. Corp., § 105 a; 19 Wall. 677; 1 Wall. 176; 16 Wall. 669; 19 Wall. 666; 1 Black. 39; 2 Cl. & Fin. 349.

Messrs. J. F. Hart, Hemphill & Hemphill, Rion, Witherspoon & Spencer, on same side.

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Messrs. LeConte, Patterson & Gaston, contra.

In addition to the authorities in their former argument, counsel cited as follows:

1. 1 McM. 222; 1 Spears, 218; 4 Rich. 382; 10 Pick. 172; 23 Wend. 103; Potter on Corp., § 432; 1 Dillon on Mun. Corp., § 22.

2. 9 S. C. 1; 7 Otto, 374; 11 S. C. 333.

3. 1 Dillon on Mun. Corp., §§ 23–30; 2 Id. 445; 9 B. Mun. 330; 9 Mo. 507; 8 Blackf. 361; 21 Ill. 451; 17 Wall. 322; 1 Otto, 540; 3 Hill (N. Y.), 531; 31 Penna. 175; 26 La. 478; 28 Mich. 228; 18 Gratt. 338; 1 Black. 39; 12 Ohio, 375; 2 Kent, 275; Cooley on Const. Lim. 230, 236, 238, note 2, 250, 251, 252, note 1; Cooley on Const. Lim. 117, 211–235, 287; 104 Mass. 87; 62 N. Y. 160; 9 Mich. 165; 40 Conn. 72; 15 N. Y. 543; 2 Kans. 215; 31 Vt. 226; 9 Cranch. 43.

WILLARD, C. J.—The leading question in this case involves the estoppels resulting from a previous action arising out of the same transactions. The action is in the name of the state, upon the relation of citizens and tax-payers of York county, to have certain bonds for the payment of money issued in the name of the county of York declared null and void, as issued without due authority of law. The defendants are the Chester and Lenoir R. R. Co., to whom the bonds in question were issued, certain parties claiming to have some right or interest in the said bonds, derived from the railroad company subsequent to their delivery by the county commissioners to such railroad company and the county commissioners of said county.

It is alleged that a suit was brought prior to the issue of such bonds by the county commissioners, and while such issue was in contemplation by Glenn and others, as citizens and tax-payers of York county, to test the authority of the county commissioners to issue said bonds, and an injunction prayed to restrict them from issuing the same; that the Circuit Court refused such injunction and dismissed the complaint, and that such judgment was affirmed on appeal to this court; that under the decision of that case and deeming it authority for so doing, the said county commissioners issued said bonds, and they came to the possession of the parties holding them as to bona fide purchasers for a valuable consideration and without notice of any defect.

The question of the effect of the judgment in the case of Glenn *v.* County Commissioners, 6 S. C. 412, upon the present case, involves two inquiries. First, as to its effect on the right of the present plaintiffs to maintain their action, which is alleged to be upon the same cause of action, and substantially between the same parties. Second. What right, if any, the present defendants acquired in virtue of the fact of having, since the rendition of such judgment, become invested with the rights that were the subject

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of controversy therein. The first of these questions is substantially identical with that which would have been raised by a former plea of a former recovery between the same parties, on the same cause of action, while the second inquiry has a large scope and involves the whole effect by way of estoppel of the judgment in the case of Glenn *v.* County Commissioners, in sustaining the rights which they claim to have acquired under that judgment.

We will consider, in the first place, whether the action of Glenn *v.* County Commissioners is to be regarded as a former recovery upon the same cause of action and between the same parties as those involved in the present case. If this had been an action in the nature of a suit at common law, and the defence of a former recovery made upon the record of a judgment in an action at common law, the question would have had a more restricted character than in the present case, as it would have to be determined in view of the legal effect of a judgment record at common law. The action of Glenn *v.* County Commissioners was in the nature of a bill in equity, and the present action is of the same nature. Equity will not permit a matter once formally adjudicated to be re-opened between the same parties or those holding under them under its decree in a collateral proceeding. The remedy of parties and privies for any errors of fact or law that may be found in a decree, is by appeal or petition or bill of review. A formal proceeding by way of review is, in substance, a prolongation of the original bill, and not in any sense a collateral proceeding. But this action is, in form and substance, a collateral proceeding. The complaint does not seek to re-open a decree and point out its errors for correction, but treats the former suits as void in toto for certain reasons therein assigned.

Is there, then, that degree of identity between the two actions that would authorize them to be regarded, as in substance and effect, between the same parties and concerning the same cause of action? As this question arises in equity, substance, rather than form, is to be looked at, as a consequence of the prevailing habit of equity. Is there, then, identity between the causes of action in the two cases? The question in the Glenn case was whether, under the act of the legislature, which was claimed as authority for issuing the bonds, the county commissioners had a right to make the subscription to the stock of the Chester and Lenoir R. R. Co., and to issue the bonds of the county of York in payment therefor, without first submitting the question to a vote of the people or electors of the county, whether such subscription should be made? If that question was decided in the affirmative, then it would follow, as a consequence, that the prayer of the complaint for an injunction would be denied, and the county commissioners would be free to proceed and issue the bonds at their discretion. The question in the present case is identical with that just stated. The

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difference between the two cases, as far as it concerns the cause of action, is in the nature of the relief demanded. Glenn's case only sought an injunction, as no rights had been acquired at that time under the intended action of the county commissioners, but at the time of the commencement of the present action such right had matured, and the relief could not, to be effectual, fall short of a decree declaring such right to be invalid. It may be contended that the prayer for relief is not a test of the identity of the causes of action; it is enough to say that it is not in the present case. The controversy is the same throughout, resting on the same facts and views of the law. At one stage of the controversy one measure of relief is called for, while at another and more advanced stage that measure of relief may be inappropriate and different relief demanded. It cannot be questioned that two actions, brought at different stages of the same controversy, although moulded to the special circumstances existing at the respective times of their commencement, yet each tending to the same general result, must be regarded as involving the same cause of action. If the contrary was admitted, there would be no stability of rights under judgments, for the moment a transaction, even judicially sustained, passed into a new stage of development, it would be thrown open to question from its very origin. As applied to proceedings in equity, this view is sustained by the principles on which equity administers justice. The contrary would tend to deprive equity of that characteristic power of adapting itself to courts contemporaneous and successive, which is the ground on which it has maintained itself, side by side, with the courts of common law. It must be concluded that in substance and effect, and therefore in the view of equity, the two causes of action are identical.

It becomes necessary, then, to inquire whether there is a substantial identity as to parties. The formal record in the case of Glenn *v.* County Commissioners, is not before us, so that we are compelled to take the title of that cause as it is reported in 6 S. C. 412. It is there stated to be an action by E. L. Glenn and others, alleging themselves to be citizens and tax-payers of York county, against H. K. Roberts and others, as county commissioners. The present action is in the name of the state upon the relation of certain other persons, alleging themselves to be citizens and tax-payers of York county, against the county commissioners of that county and parties who, since the case of Glenn was decided, have become holders of, or interested in, the bonds issued by the county commissioners. As far as it regards the defendants, the identity is complete, as the addition of parties who have acquired an interest in the controversy since the judgment in the first case, is a circumstance consistent with the fact of the identity of the controversy in the two cases. Had the case of Glenn continued undecided to the present time, and were the plaintiffs in that case seeking still the

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general results sought by the complaint in that case in some form to suit the condition of matters that have arisen since that suit was commenced, it would be a matter of prudence to make the persons who had acquired rights after the commencement of that suit parties, so that a direct decision upon their individual rights could be reached, which should act immediately, and not merely indirectly, upon them. Parties acquiring an interest in the subject matter of a suit after action commenced, from or under the parties to such action, apart from the question of notice, are privies, and it certainly cannot be contended that there is a want of identity between the suits in equity merely because persons who are privies under the one are made parties to the other.

Are, then, the plaintiffs in the two cases to be regarded as, substantially, and in the view of equity, identical? It is necessary to look to the character of suits like the present in order to understand fully the nature of this question. This belongs to the class of remedies proceeding, nominally, in the right of the state, but, actually, in the interest of a class of individuals having common rights that need protection. It is, therefore, related to that more general class where individuals possess the right to represent the class to which they belong in respect of rights either common to the class, or competing as to a certain subject of property. A bill to enjoin a common nuisance is an instance of this class, based on common rights, and a creditor's bill another, based on competitive rights. This jurisdiction, in some respects, rests on the principles of a proceeding in rem, as the court of equity, through it, lays its hands upon a fund at the instance of some of the parties interested in it, and, by a proper proceeding, administers it with a conclusive effect upon the rights of all others having similar rights thereto. Although equity, as a system, proceeds upon the ground of personal duty, and hence against persons rather than things, yet there are many instances where proceedings in equity partake of the nature of an action in rem. Another principle that appears to be fundamental to such jurisdiction by means of class representation, has an analogy to the familiar principle of the law that where rights of a certain nature are common to large classes of persons, individuals may acquire, by prior occupancy, a superior right, whether temporary or permanent, over all others of that class in respect of such right. The strict illustration of this principle is where such common right has its origin from the law of nature, as in the case of waste and unoccupied lands never subjected to individual right, and animals feræ naturæ, and the like. Where many have a common right to the means of protection by a legal proceeding, this principle is suggested and would enable such as seek the remedy, with the advantage of priority, to have a superior right to prosecute such remedy. Where there are competing rights in a single subject, equity recognizes and protects the priority by injunc-

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tion, as in the case of a creditor's bill. This right of representation is, however, from its nature, subject to the restriction that the door of controversy must be opened to all of the class represented, who may, on certain conditions, unite in exercising control over the prosecution of the remedy.

Common or public rights having their origin in the municipal law, are usually protected by the action of the public authority. In England that right of procedure is in the King or his attorney-general, while with us it is in the state. It is customary to allow private individuals having a personal interest in the protection of such rights, to use the name of the state for the purpose of protecting them, and applying the principles of class representation, a portion of the persons of the community are enabled to become relators, such a proceeding being, in reality, the representatives of the class to which such relators belong.

Such is the nature of the present action. Whether the name of the state is indispensable in such proceedings need not be considered. If it is not, then in the present case its use may be treated with surplusage, and the nature of the case regarded as the same as if the action had proceeded wholly in the names of the persons here styled relators, as was the case in Glenn *v.* County Commissioners. If, on the other hand, the name of the state is indispensable, then the want of such name would have constituted a ground of defence in Glenn's case. As no such objection was made in that case, it must be treated as if it had been properly brought in the name of the state. In this view, the difference between the two cases would be resolved to that of a misnomer alone, and that equity, at least, would overlook.

We come, then, to the main question involved, as it regards the identity of the plaintiffs in the two cases. It is easy to see, from the principles already stated, that the rights that were represented in the former case are here attempted to be represented again for the same general purpose. The principle of representation is embodied in Section 142 of the code, as follows: "Where the question is one of a common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." It is clear that this language contemplated cases where the results of such an action would affect, finally and conclusively, a larger number of persons than those who are immediate parties, for the object of the section was to enable some of a class to act in a manner conclusive to others of the same class, by representing them. Without the aid of this provision of the code, or the principles on which it was founded, the immediate parties could bind themselves; that in which they needed the aid of the statute, or the principles that existed prior to it, was that the subject of the controversy might be exclusively affected in such a way as to bind

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others not parties, but merely represented by others as such. The code, evidently, was not intended to exclude others who might choose to come in with those who assume to act as their representatives, but is consistent with the idea that if they stand out they will be bound by what is done in their name. It would follow that when plaintiffs, or relators standing in the place of plaintiffs representing a class of persons, bring an action based on such class rights and are defeated in such action on the merits, no subsequent action can be effectually brought by the same parties or by other parties of the class thus represented. This would dispose of the present appeal if it shall appear that the case of Glenn *v.* County Commissioners was decided finally and on the merits, provided the use of the name of the State does not interfere with the application of the principles that would apply had the present suit been maintainable and actually brought in the name of the relators without that of the State. This last proposition will be first considered. It is not reasonable to suppose that the State, in lending its name to individuals for the protection of their rights, intended to subvert the principles governing controversies of the class to which this belongs. We need not consider what would be the result if the State, having a substantial interest in this action, should claim that it was not affected by the case of Glenn, for that is not the case here. The State, as such, has no interest in the suit beyond the indirect interest of having protection afforded to the common and public rights represented by the relators. It must then be considered that the same principles apply to the present case that would apply had the relators been the only plaintiffs and capable of prosecuting as such. Then all that remains is the inquiry whether the case of Glenn *v.* County Commissioners appears to have been finally and conclusively decided upon the merits.

We will consider, in another place, the matters of fact and law decided in that case, but at present the question is whether the disposition must be regarded as upon the merits of the controversy. If it appears that the bill was dismissed for lack of proper parties, for the want of a statement of a sufficient cause of action, or for defect of proof leading to a non-suit, then nothing would prevent its renewal in the form in which it appears in the present case. But can such a conclusion be drawn?

It is stated in the report of the case (6 S. C. 415), that "on August 16th, 1873, the cause was heard upon its merits before the Hon. Judge Mackey, who, on September 12th, 1873, filed the following order and decree."

The opinion of the Circuit Judge is confirmed as to the merits of the case. He says: "I have considered the questions at issue solely upon their merits, and without interposing those technical rules of practice which would have justified the court, sua sponte, in dismissing the complaint." What would have justified the

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court, sua sponte, in dismissing the complaint is not stated, and as no defect of jurisdiction has been suggested as appears, cannot be conjectured, but it is quite apparent that no objection had been taken to matters of form, as then it would have been unnecessary to suggest the possibility of the dismissal of the complaint, sua sponte. The decree was, then, clearly on the merits. The plaintiffs appealed from the decree, and, of course, only raised by way of appeal, questions of substance. The appeal was dismissed by this court, and that left the decree of the Circuit Court standing on the ground on which it was originally pronounced. It is true that the majority of this court did not state the grounds for dismissing the appeal, but that, though of interest in an aspect not at present under consideration, is of no importance to the present question. If it is assumed that the appeal was dismissed for irregularity and not upon the merits, that would not alter its effect, for it left the Circuit decree standing with the same force and effect that it had when first pronounced. It must be concluded that the Circuit decree in the case of Glenn *v.* County Commissioners was a decision upon the merits, and in its nature final and conclusive and a bar to the present action.

Although it may not be necessary in order to dispose of the present appeal to go beyond the matters already discussed, yet the importance of the principles and the magnitude of the interests involved, render it appropriate that certain other questions raised in the case should receive consideration. Among these one, already noticed, is entitled to a place, namely, what is the effect, by way of estoppel, of the decree in Glenn *v.* County Commissioners, considered apart from the question of the bar of a future action created by such decree? Assuming that there was no formal objection to the maintenance of the present action, must the matters decided in the Glenn case be regarded as so far settled between the present parties that the record in that case is conclusive of all the allegations of fact and law in the present complaint? It is clear that the county commissioners, being parties to both suits, have a right to rely on the conclusive character of the decree in that case. If they had not, they might be placed in the position of having unlawfully issued the bonds in controversy, although at the time of issuing them they had the sanction of a decree of the Circuit Court in a suit to which they were parties, affirmed as the result of an appeal to the Supreme Court. The other defendants stand in the position of having acquired rights under the decree in question, and upon the faith of such decree. By the acquisition of such rights they became privies to the decree, and had a right to rely on its estoppels and were bound by its consequences. As such they may allege the bar of the decree to any further agitation of the questions involved, as they would be precluded from averring against such decree, as it regards its effect upon the property acquired by

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them under the decree, had it gone against their interests, as effectually as if they had been parties to the suit in which the decree was rendered. It would not be questioned, if the subject of the former action was the title to land, that a decision thereon would conclude all parties becoming purchasers after judgment from parties bound by such judgment. In the present instance the subject of the action was a power to issue bonds, and the question was its legal validity, and the defendants, who have taken bonds under such power, may well contend that their titles were conclusively passed upon when the power under which it had arisen was judicially sanctioned. It would follow that in the present case they have the right to set up the decree as a bar and estoppel to any attempt to disturb the decision on which their title rests.

We have said in State *v.* County Treasurer (MS., Dec., Nov., 1877) that as a majority of the court who decided Glenn's case did not disclose the grounds of their decision, this court is not committed to any view of the questions discussed in that case, and that the court deems all questions of law that arose therein as open and undecided, except so far as relates to the parties in that action. Parties here should be taken to include privies; indeed, privies are always intended when a general reference is made to parties. This court concurs in the positions taken in the dissenting opinion in the Glenn case, and if the question was open before us would have no hesitation in placing the case upon such grounds.

This extension of the protection of a decree to those deriving their rights under it at any time subsequent to such decree, when in harmony with the technical rules that govern remedies and their effects, is demanded by a principle that has received its most unqualified statement in the case of Gelpcke *v.* City, 1 Wall. 175. It is there held that if, at the time when municipal bonds are issued, the law, as expounded by the highest court of a State, sanctions the validity of such issue, no subsequent decision of the court can impugn the validity of such bonds by overruling its former decision. This principle is applied in that case in the most general manner, and without regard to whether the former decision was upon the power or authority to issue the particular bonds in question. It is, therefore, in effect placing the principle of stare decisis upon higher ground than it has ever before occupied. We are now compelled by the language of the case to believe that the Supreme Court of the United States intended to hold that a decision of a State court overruling a former decision, under such circumstances, becomes, in effect, a law of a State impairing the obligation of a contract, so as to become involved under the Constitution of the United States. We cannot assume that that court intended to expand the constitutional sense of the word "law" so as to become a guarantee that no State court should violate the rule of stare decisis so as to affect contract rights. Whatever difficulty may suggest

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itself as to the possibility of safely applying the principle in question in the naked form in which it is presented in the case just cited, it is easy to recognize the principle itself as just and suitable to be applied whenever the nature of our remedial system will admit of it. In the present case its application is consistent with the rules governing the proper effect of remedies, and therefore justifiable.

It only remains to notice the objection that was raised upon the argument of the appeal, that the county of York, not being a corporation, bonds issued in its name are without validity. The question of the right of the county commissioners to issue the bonds of the county of York, that was presented in Glenn's case, necessarily involved the further question, whether the county of York is capable, legally, of making a valid bond, and therefore, it is manifest that the question cannot be re-opened in the present case. If it could be, it would not be necessary to consider the broad question whether the county of York is a corporation. It would be sufficient to ask whether it had legal power to contract obligations within the scope of its legitimate interests. If it possesses such capacity, the only question would be whether the legislature had authorized its exercise, and that question is disposed of, as between the present parties, by the decree in Glenn's case. It will be conceded, without difficulty, that it is competent for the legislature to confer upon the people of a county power to incur obligations binding upon them, as a community, unless forbidden by the constitution. The argument before us has been mainly addressed to the question whether the constitution has created the counties into corporations, or so arranged their character and powers as to amount to exhaustive legislation on the subject, thus, impliedly, excluding the legislature from legislating either antagonistically or cumulatively on the same subject. This view is not a necessary one to the matters at issue in the present case. The true inquiry is, whether there is anything in the constitution that precludes the legislature from permitting the counties to incur any obligation whatever in the nature of a contract; for the objection is such as would apply to any contract obligation whatsoever. It is impossible to find any clause in the constitution that admits of the construction contended for; but, on the contrary, there are provisions of a positive character from which it is reasonable to infer that the counties were intended either to have originally or from the legislature capacity to contract obligations necessary to the transaction of their local business.

Section 19, Article IV. of the constitution provides that "the qualified electors of each county shall elect three persons, for the term of two years, who shall constitute a board of county commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of

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money for county purposes, and in every other case that may be necessary to the internal improvements and local concern of the respective counties." Here is an express recognition of the capacity of the communities styled counties to have interests peculiar to themselves and not common with all other citizens of the state. The terms "local concerns" are of the most general character, and, that they are not intended to be confined to such matters of state administration as may happen to fall for execution within the territorial limits of the respective counties, is evinced by the provision for "internal improvements;" clearly internal improvements of a general character as affecting the state at large, or one or more counties were not here referred to as the administration of such improvements would not be committed to boards circumscribed by county lines, but to more general bodies, whose jurisdiction would be commensurate with the local extension of such internal improvements. It must then be understood that what may be called county improvements may be brought within the capacity of the counties as local communities. The words internal improvements admit, naturally, of an extended signification. It is left to the legislature to fix the character of the improvements that may be thus undertaken within the scope of the sense of the constitution. The right of improvement embraces power to create facilities that do not exist. The right to make improvements of a local character implies power to acquire and hold property and to renew obligations and make contracts in relation to such property as ordinary means for that purpose. It cannot be doubted that if the legislature should authorize a county to purchase the road and franchises of a turnpike company and throw the road open to the public, that such a transaction would be an improvement in the sense of the constitution. To allow such a transaction is, impliedly, to allow an obligation to be contracted for that purpose.

Section 8, Article IX. of the constitution speaks of the "corporate purposes" of counties as objects for raising and expending county taxes, thus strengthening the view already presented, that these communities are capable of acquiring interests distinct and apart from such as concern the state at large; the limit is put by the constitution to the extent or character of such corporate purposes. That the community may have local interests calling for the expenditure of money is clearly recognized and provided for, and that implies the power of incurring obligations and of satisfying them.

It must be concluded that there is no constitutional restriction depriving the legislature of the power of authorizing counties to incur obligations, and that is decisive of the question under consideration.

The judgment must be affirmed and the appeal dismissed.

McIver and McGowan, A. J.'s, concurred.

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The eleven cases above reported involve the consideration of a very interesting and complex question in modern law, viz., the validity or invalidity of municipal bonds issued in aid of railroad companies. Although the topic is comparatively a new one, having only been brought to the attention of the courts within the past twenty or twenty-five years, it has already given rise to a vast amount of litigation and entailed a formidable array of judicial decisions which are unfortunately by no means altogether harmonious. The great number of these decisions and the wide divergence of the views expressed in them render it difficult, nay impossible, to present in this note anything like a complete exposition of the law on this point. The aim will be therefore merely to state such general principles as have been well settled by repeated decisions, and to refer the reader to the most recent cases in the various States, where those principles have been enunciated.

It seems, in the first place, to be universally admitted that municipalities have no inherent or implied right to subscribe to or to issue bonds in aid of a railroad company, although the purpose may be to enable such company to construct its roads by or through such municipality.

St. Joseph Township *v.* Rogers, 16 Wall. 644; South Ottawa *v.* Perkins, 94 U. S. 260; People *v.* Mitchell, 35 N. Y. 551; Pa. R. R. Co. *v.* Philadelphia, 47 Pa. St. 189; Lamoille Valley R. R. Co. *v.* Fairfield, 51 Vt. 257; Delaware County *v.* McClintock, 51 Md. 325; Jeffries *v.* Lawrence, 42 Iowa, 498; Barnes *v.* Lacon, 84 Ill. 461; French *v.* Feschemaker, 24 Cal. 518; Brodie *v.* McCabe, 33 Ark. 690; Lewis *v.* Shreveport, 3 Woods, 205; Pitzman *v.* Freeburg, 92 Ill. 111; Gaddis *v.* Richland Co., 1 Pid. 119; Ogden *v.* Co. of Daviess (supra); Cogwin *v.* Town of Hancock (supra); Welch *v.* Post (supra); Goddard *v.* Stockman (supra). In order to confer such a power there must be an express legislative enactment.

Much doubt has, however, been entertained as to the constitutional right of the legislature to confer such a power, and upon this point a great number of decisions have been rendered. The question turns altogether upon what is and what is not a constitutional exercise of the taxing power. The funds necessary to pay the principal and interest of such bonds must of course be raised by taxation from the inhabitants of the municipality. Taxation however can only be imposed for public purposes. Is the construction of a railroad by a private company to or past a town to be considered as a public purpose in so far as the inhabitants of that town are concerned? The great weight of authority is to the effect that it is, and acts of the legislature authorizing the issue of bonds in aid of the construction of such railroads are accordingly generally held constitutional and valid. Olcott *v.* Supervisors, 16 Wall. 678; Fielder *v.* Mont. & E. R. Co., 51 Ala. 178; Stockton & V. R. R. Co. *v.* Stockton, 41 Cal. 147; Douglas *v.* Chatham, 41 Conn. 211; Columbia Co. *v.* King, 13 Fla. 451; Powers *v.* Dougherty Co., 23 Ga. 655; Quincy, M. & P. R. Co. *v.* Morris, 84 Ill. 410; Williams *v.* Hall, 65 Md. 129; Shelby Co. *v.* Cumberland & O. R. R. Co., 8 Bush, 209; Augusta Bank *v.* Augusta, 49 Me. 507; State *v.* Clark, 23 Minn, 422; Parker *v.* Scogin, 11 La. Ann. 629; Osage Valley & S. R. R. Co. *v.* Morgan, 53 Mo. 156; N. O., St. L. & C. R. Co. *v.* McDonald, 53 Miss. 240; Gibson *v.* Watson, 5 Nev. 283; Perry *v.* Keene, 56 N. H. 514; Duanesburg *v.* Jenkins, 57 N. Y. 177; Hill *v.* Forsythe County, 67 N. C. 367; Walker *v.* Cincinnati, 21 Ohio St. 14; Armstrong *v.* Perkins, 43 Pa. St. 400; Copes *v.* Charleston, 10 Rich. 491; Winston *v.* Tenn. and P. R. Co., 57 Tenn. 60; San Antonio *v.* Gould, 34 Tex. 49; List *v.* Wheeling, 7 W. Va. 501; Oleson *v.* Green Bay and L. S. R. Co., 36 Wis. 383; Knox Co. *v.* Aspinwell, 21 How. 539; Stewart *v.* Polk Co., 30 Iowa, 1.

On the same principle retroactive statutes confirming the validity of railroad aid bonds already issued have been generally held to be valid and effectual. People *v.* Mitchell, 35 N. Y. 551; Bissell *v.* Jeffersonville, 24 How. 287; City *v.* Lamson, 9 Wall. 477; Steines *v.* Franklin Co., 48 Mo. 167; Knapp *v.*

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Grant, 27 Wis. 147; Black v. Cohen, 52 Ga. 621; Duanesburgh v. Jenkins, 57 N. Y. 177; Kimball v. Rosendale, 42 Wis. 407; Cooley on Const. Lim., 871 and cases there cited.

See for a comprehensive view of this side of the question the opinions in Sharpless v. Mayor of Phila., 21 Pa. St. 158, which Black, C. J., pronounced the most important case in Pennsylvania since the formation of the government.

The constitutionality of these enactments is however by some courts strenuously denied. People v. Salem, 20 Mich. 452; Thomas v. Port Hudson, 27 Mich. 320; and see Williams v. Duanesburgh, 66 N. Y. 129. Text writers of great authority have expressed a similar opinion. Dillon on Municipal Corp., § 156 et seq.; Cooley on Constitutional Limitations, §§ 261–266; Redfield's note to People v. Township Board, 9 Am. L. Reg. (N. S.) 487.

In several States the passage of such acts is expressly prohibited by a clause in the constitution. See constitutions of New York, Pennsylvania, Missouri, Illinois and Ohio. (Of Walker v. Cincinnati, 21 Ohio St. 14.) In others the right to pass them is hampered by certain salutary restrictions and limitations. See constitutions of Indiana, Kentucky, Mississippi, Minnesota, Nebraska and West Virginia.

In some States general statutes have been passed to a similar effect. These statutory and constitutional provisions are usually construed as prospective only, and are not therefore considered as abrogating prior express grants of power by the legislature. Macon Co. v. Shares, 97 U. S. 272; Schuyler Co. v. Thomas, 98 U. S. 169; Fairfield v. Gallatin Co., 100 U. S. 47; State v. Clark, 23 Minn. 422; State v. Green Co., 54 Mo. 540; Dodge v. Platt Co., 16 Hun, 285. But see Aspinwall v. Daviess Co., 22 How. 364; Falconer v. Buffalo and J. R. Co., 69 N. Y. 491; List v. Wheeling, 7 W. Va. 501.

They may, however, if so expressly worded, produce that effect, unless indeed a binding contract has been entered into to issue the bonds in accordance with the prior grant of power so to do. The question of what is and what is not a binding contract depends of course upon the peculiar circumstances of each case. See as to what constitutes a binding contract Co. of Clay v. Society (supra); Welch v. Post (supra); Shelby Co. Ct. v. Cumberland, etc., Ry. Co. 8 Bush (Ky.) 300; Clarke Co. v. Paris, Winch. and Ky. Riv. T'ke Co., 11 B. Monr. 148; Nugent v. Supervisors of Putnam Co., 19 Wall. 241.

The mere passage of a vote by the inhabitants of a municipality to the effect that such bonds shall be issued does not constitute the contract to issue them binding, Aspinwall v. Co. of Joe Daviess, 22 How. 364; Town of Concord v. Portsmouth Sav. Bk., 92 U. S. 625; Harshman v. Bates Co., 92 U. S. 569; V. P. R. R. Co. v. Davis Co., 6 Kans. 256; Jeffries v. Lawrence, 42 Iowa, 498; Bound v. R. R. Co., 45 Wis. 543; C. and O. R. R. Co. v. Barren Co., 10 Bush. 604.

Acts authorizing the issue of municipal aid bonds which are in contravention of any direct constitutional provision are of course void. Bank v. Barber (supra); C., B. and Q. R. Co. v. City of Aurora (supra).

As a general rule where an act is past authorizing the issue of such bonds upon certain conditions and in a certain manner, the terms of the act must, in order to give the bonds validity, be strictly complied with. People v. Jackson Co., 92 Ill. 441; Daviess Co. v. Howard, 13 Bush. 101; Willsboro. v. N. Y. Cent. R. R. Co., 76 N. Y. 132; Lippincott v. Pana., 92 Ill. 24; Springsport v. Bank (supra).

Provisions of such acts however, which are merely directory, need not be strictly complied with. See as to what provisions are regarded essential to the validity of the bonds and what merely directory. Wood v. Lawrence Co. 1 Black, 386; Mayor v. Lord, 4 Wall. 409; Coloma v. Eaves, 92 U. S.

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484; Supervisors v. Galbraith, 99 V. S. 214; Cass Co. v. Gulett, 100 U. S. 585; Roberts v. Bolles, 101 U. S. 119; Stanton v. Ala. and C. R. Co., 2 Woods, 523; Hardenbergh v. Van Keuren, 16 Hun, 17; Deming v. Houlton, 64 Me. 254; Soc. of Saving v. New London, 29 Conn. 174; Eagle v. Kohn, 84 Ill. 292; Mt. Vernon v. Hovey, 52 Md. 563; Neal v. Saline Co., 48 Mo. 390; Vicksburg v. Lombard, 51 Miss. 111; Board v. Texas and P. R. Co., 46 Tex. 316; Read v. Henry Co., 31 Gratt. 695; McPherson v. Foster, 43 Iowa, 48; Draper v. Springport (supra).

One of the most usual provisions in such acts is to the effect that the question whether the bonds shall be issued or not must first be submitted to a vote of the citizens of the municipality. The constitutionality of such a provision is well settled. Slack v. Maysville and L. R. R. Co., 13 B. Monr. 1; Locke's Appeal, 72 Pa. St. 491; St. Louis v. Alexander, 23 Mo. 483; Clarke v. Rochester, 28 N. Y. 605; Blanding v. Burr, 13 Cal. 343; Hobart v. Butte Co., 17 Cal. 23. It is also usually required that a majority of the voters shall give their assent to the proposition. In such case the phrase "a majority of the voters" will be construed to mean a majority of those depositing ballots. Cass Co. v. Johnston, 95 U. S. 360; Douglas v. Pike Co., 101 U. S. 677; Melvin v. Lisenby, 72 Ill. 63; Reiger v. Beaufort, 70 N. C. 319; Louisville and N. R. Co. v. Tennessee and Hask. 663. But see McWhorter v. People, 65 Ill. 290; Hawkins v. Carroll Co., 50 Mo. 785; Webb v. Lafayette Co., 67 Mo. 353.

The preparatory steps to issuing the bonds being all taken in accordance with the terms of the act, it becomes the duty of the township officers to execute and issue the instruments. If they fail to do so, a mandamus may issue to compel them. Bittinger v. Bell, 65 Md. 445; People v. Batchellor, 53 N. Y. 128; Napa Valley R. R. Co. v. Napa Co., 30 Cal. 435; Illinois Midland R. R. Co. v. Barnett, 85 Ill. 313; Cinn., W. and Z. R. Co. v. Clinton Co., 10 hio St. 77; Clarke Co. v. P., W. and K. R. Turnpike Co., 11 B. Monr. 143; C., D. and M. R. Co. v. Olmstead, 46 Iowa, 316; Ex parte Rowland et al. (supra).

The vast number of railroad aid bonds issued and the wide circulation they have attained has of late years thrown much of the litigation regarding them into the Federal Courts. The Supreme Court of the United States has repeatedly been called upon to render decisions as to their validity, and has been particularly solicitous to protect the interests of bona fide holders and to check the tendency towards repudiation which has unfortunately been too prevalent.

This high tribunal has accordingly laid down a series of principles which differ for the most part from those obtaining in State courts, and which it is conceived are eminently calculated to insure substantial justice.

The most important of these principles may thus be stated. Where the highest appellate court of a State has pronounced in favor of the validity of certain municipal bonds, and on the faith of that decision such bonds have been negotiated and passed into the hands of bona-fide holders for value, no subsequent decision of the State Court will be allowed to affect the validity of the bonds. The United States Courts will invariably in passing upon the question of their validity follow the former decision of the State Court and not the latter. This doctrine, usually known as the doctrine of Gelpcke v. City of Dubuque (1 Wall. 175), has been followed in various other cases. Thomson v. Lee Co., 3 Wall. 327; Butz v. Muscatine, 8 Wall. 575; Alcott v. Supervisors, 16 Wall. 678; Douglas v. Pike Co., 101 U. S. 677. It is now well established law. More than this, where a grant of power has been made by the legislature of a State to issue municipal bonds, and such grant has been decided by the State Courts to be unconstitutional, the United States Courts will, in passing upon the question, disregard the decision of the State Courts and follow the rulings of the Supreme Court of the

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United States. Tallcott v. Township of Pine Grove, 1 Bench and Bar (U. S.), 50. See on this subject State v. C. and L. R. R. Co. (supra).

In suing upon municipal bonds very nice and difficult questions often arise as to how far an innocent holder for value is affected by irregularities in their issue or a failure to comply with all the requirements of the act to which they owe their existence.

The prima facie presumption is of course that there has been no irregularity and that all the requirements have been complied with, and the burden of proof is on the municipality to show that the contrary is the case. Lincoln v. Iron Co., 103 U. S. 412.

The effect of recitals on municipal bonds as to the requirements of the act authorizing their issue having been complied with is differently viewed in different courts. In the courts of the United States where it is the sole province of the municipal officers executing the bonds to decide whether or not more requirements have been complied with, the mere existence of such recitals is of itself sufficient protection to a bona fide holder, and will estop the municipality from setting up as a defence any irregularities or omissions that may have occurred. Comm. of Knox Co. v. Aspinwall, 21 How. 539; Moran v. Miami Co., 2 Black, 722; Supervisors v. Schenck, 5 Wall. 772; Gelpcke v. Dubuque, 1 Wall. 175; St. Joseph Township v. Amy, 16 Wall. 644; Pendleton Co. v. Amy, 18 Wall. 297; Coloma v. Eaves, 92 U. S. 484; Co. of Randolph v. Post, 93 U. S. 502; Commis. of Johnson Co. v. Thayer, 94 U. S. 631; Co. of Cass v. Johnson, 95 U. S. 360; San Antonio v. Mehaffey, 96 U. S. 312; Nauvoo v. Ritter, 97 U. S. 389; Daviess Co. v. Hendekap Co., 98 U. S. 98; Hackett v. Ottawa, 99 U. S. 86; Foote v. Pike Co., 101 U. S. 688; also City of St. Louis v. Shields, 62 Mo. 247; Smith v. Clark, 54 Mo. 58.

Unless, of course, the recitals be of such a nature as to affect the holder with notice of the invalidity of the bonds. Harshman v. Bates Co., 92 U. S. 569; McClure v. Oxford, 94 U. S. 429; Bates Co. v. Winters, 97 U. S. 83; Lewis v. Barbour Co., 8 Fed. Rep. 191; Wilson v. Salamanca, 99 U. S. 499.

If, however, there be no power to issue the bonds the recitals thereon can have no possible effect upon the rights of a bona fide holder, the bonds will be void even in his hands. Barnes v. Lacon, 84 Ill. 461; Williams v. Roberts, 88 Ill. 1; Lippincott v. Pana, 92 Ill. 24; Sykes v. Columbus, 55 Miss. 115; Williams v. Keokuk, 44 Iowa, 88; Marsh v. Fulton Co. 10 Wall. 676; Loan Ass'n v. Topeka, 20 Wall. 655; Aspinwall v. Co. of Daviess, 22 How. 364; Thompson v. Perrine, 103 U. S. 806; Harshman v. Bates Co., 92 U. S. 569.

The following is an excellent resumé of the doctrine of the United States courts on this point taken from the opinion of Mr. Justice Clifford in St. Joseph Township v. Rogers, 16 Wall. 644: "Bonds payable to bearer issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation, which possesses no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of these recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled."

The doctrine of the United States courts with regard to the effect of re-

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citals is generally disregarded in toto by the State courts, and a failure to comply with the stipulated qualifications and conditions is accordingly held fatal even to a bondholder, notwithstanding the fact that on their face the bonds set out that they are properly issued. Lamoille et al v. Fairfield, 51 Vt. 237; People v. Waynesville, 88 Ill. 469; Sykes v. Columbus, 55 Miss. 115; Delaware Co. v. McClintock, 51 Md. 325; Harding v. R. R. I. and St. L. R. Co., 65 Ill. 90; Woodruff v. Okaloona, 57 Miss. 806; Cagwin v. Town of Hancock, supra.

A conclusive effect may, however, be conferred by statute upon such recitals, so that the municipality may be estopped from denying their truth. Mercer Co. v. Hacket, 1 Wall. 83; Lynde v. Winnebago Co., 16 Wall. 6; Rock Creek v. Strong, 96 U. S. 271; Block v. Commissioners, 99 U. S. 686; Munson v. Lyons, 12 Blatch. 539; People v. Mitchell, 35 N. Y. 551; E., I. and C. S. R. R. Co. v. Evansville, 15 Ind. 395; Co. of Clay v. Society, supra.

The mere issuing of municipal bonds regular on their face is held to be conclusive that all the provisions of municipal ordinances relative to their execution and issue have been complied with. Commonwealth v. Pittsburgh, 43 Pa. St. 391; Gilchrist v. Little Rock, 1 Dill. C. C. 261; Damelly v. Cabaniss, 52 Ga. 211; Black v. Cohen, 1 Pid. 261.

In the United States courts it is held that the levying of taxes to pay interest on municipal bonds and the actual payment of that interest for some time will be sufficient to estop the municipality from subsequently setting up as a defence to the bonds the lack of power on its part to issue them. Supervisors of Marshall Co. v. Schenck, 5 Wall. 772.

This is denied generally by the State courts, Marshall Co. v. Cook, 38 Ill. 44; Shoemaker v. Goshen, 14 Ohio St. 569; Veeder v. Lima, 19 Wis. 280; Dunnovan v. Green, 57 Ill. 268.

It is, however, admitted that such levying of taxes and payment of interest will estop the municipality from setting up as a defence a mere irregularity in the issue of the bonds. Keithsburg v. Frick, 84 Ill. 405; Mercer Co. v. Hubbard, 45 Ill. 139; R. R. Co. v. Marion Co., 36 Mo. 294; Beloit v. Morgan, 7 Wall, 619; County of Clay v. Society for Savings, supra.

For further information upon this topic the reader is referred to 1 Dillon on Municipal Corporations, §§ 153–164, 511–554; Pierce on Railroads, Chap. IV., and Cooley on Constitutional Limitations, pp. 260–272.

MICHIGAN AIR LINE RY. CO.

v.

HARVEY MELLEN et al.

(*Advance Case, Michigan. October* 18, 1881.)

Township aid bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had put up and agreed to convey, but did not do so. *Held*, on a bill for an accounting, that he should be charged with the bonds.

Where several persons either as co-partners or joint contractors had done work under an agreement with a railway company, a payment made to one of them in township aid bonds binds the rest if with full knowledge of the facts they decline to repudiate the payment and make a distinct claim upon the company.

Creditors who have received bonds in payment cannot retain them and

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question their validity or value at the same time; if they wish for a payment in cash they must give up the bonds.

A creditor cannot keep money paid to him to satisfy any claim but that on which it was actually paid, unless his debtor consents.

A debtor when making a payment has the right to direct its application, and the creditor cannot refuse to apply it accordingly and credit it on some other account.

It is a fraud upon the rights of a railway corporation if a director who buys lands for the use and benefit of the company and pays for them with its funds, takes the title in his own name or jointly with others; and the nominal grantees would hold in trust for the company.

APPEAL from Macomb. Submitted April 8. Decided Oct. 13.

Bill for accounting: to compel a conveyance of the premises to complainant; to compel the delivery of certain bonds to complainant; and to enjoin defendant from suing in ejectment for the premises referred to in the bill. Complainant appeals. Reversed.

Irving D. Hanscom and Ashley Pond for complainant.

Dwight N. Lowell, A. B. Maynard and James B. Eldridge for defendants.

MARSTON, C. J.—From the evidence we find the following facts in this case:

Defendant, Harvey Mellen, was director of the Michigan Air Line Ry. Co.—complainant company having acquired its rights and property by purchase—and as such director he had charge of the eastern end of the company's road, negotiated and acquired for it right of way and depot grounds, and acted for the company quite generally.

Other directors of the company acting with Mellen had agreed that certain lands should be purchased from the Bailey heirs for depot grounds in the village of Romeo, and Harvey Mellen agreed to negotiate for and purchase such grounds. He with the assistance of a brother and John Phelps succeeded in purchasing the lands, and the title thereto was taken in their joint names as owners. Phelps afterwards conveyed his interest to defendant Tackles. Defendants erected a depot building upon these grounds and other work was done by them, and they now claim that the railroad company must pay them the value of such improvements, and the price paid by them for the land to the Baileys, when they will convey to the company, subject to certain rights which they claim they were to have in and to an elevator and lime house which they erected on their own account upon these grounds under an agreement with the company.

These depot grounds purchased from the Baileys were purchased by Harvey Mellen acting as a director, and paid for by him in bonds belonging to the company drawn out of the bank where deposited for that purpose. This seems too clear to be really open to dispute. The small amount paid in cash—less than $100—the

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difference between the face of the bonds and the price of the land, is not worthy of notice in this connection. It does not appear that either of the other parties, John Phelps or John N. Mellen, put one dollar into the land. We also find as a fact that Harvey Mellen afterwards received from McNaughton, managing director of the company, twenty-five hundred dollars in township aid bonds, which at their par value was more than sufficient to pay for depot buildings and other improvements; that when he received these bonds he agreed that a deed to the company, if not then executed, would be and be delivered and recorded, which was not done. These bonds he still retains or the proceeds thereof, and should be charged therewith. The building having been erected under an agreement with the company, whether the defendants were copartners or joint contractors, in either event Harvey Mellen would have a right to receive payment from the company therefor and bind the others thereby. Whether he could bind them by taking anything else but cash we need not at present determine, as they, with full knowledge of the facts, made no distinct claim upon the company, in repudiation thereof, for a long period thereafter. The authority of Harvey Mellen to represent his associates is not seriously questioned. All the defendants concur in saying that the bonds were not accepted, as they wanted the money and were uncertain as to the value or validity of the bonds. They could not, however, retain the bonds and at the same time question their validity or value. If they desired to have the company pay them the amount due, in cash, they should have surrendered up the bonds, but this was not done. It is true Harvey Mellen says he claimed to hold these bonds upon another claim he had against the company. This, however, he could not do without the consent of the company thereto. Having received them to apply upon one claim, he could not refuse so to apply them and credit them to some other account. The debtor had the right at the time of making the payment to direct the application. This was done, and they were delivered to apply on the amount due the defendants, and they could not refuse to so receive them, and yet retain and apply them upon an individual account without the debtor's assent.

Harvey Mellen as a director of the company could not purchase lands for its use and benefit, and pay for the same with the funds of the company, and at the same time, without authority, take the title thereto in his own name or jointly with others, as in this case. Such would be a fraud upon the rights of the company, and they would hold the title in trust for the company.

The company and defendants have been in the joint possession of this property, and defendant's possession must be held a sufficient compensation for the taxes and insurance they have had to pay, especially as their holding was wrongful.

Under their original agreement they were to have an exclusive

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right to build and use an elevator and lime house. Such a building they have erected, and they should be protected in their rights thereto in accordance with the agreement.

The decree below must be reversed with costs of both courts and one entered here in accordance herewith.

The other Justices concurred.

WILLIAM TRUESDALE et al.

v.

THE PEORIA GRAPE SUGAR CO.

(*Advance Sheets*, 101 *Illinois Reports*. *September* 26, 1881.—*Rehearing denied March Term*, 1882.)

A court of equity will not take jurisdiction to restrain the laying of a railroad side-track by a company in the public street in front of its own property to connect with the main track of a railway, under license by the city council, by ordinance, on a bill by private individuals owning property in the vicinity but not abutting on the part of the street to be used.

Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street, must be sought in an action at law.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. D. McCulloch, Judge, presiding.

Mr. Julius S. Starr, and Messrs. Cooper & Tennery, for the appellants:

While it is true that a city holds the fee of the streets, it is in trust for the benefit of the public, and the city authorities have no rightful power to alienate them or divert them to other uses. Carter *v.* City of Chicago, 57 Ill. 287; Stack *v.* City of East St. Louis, 85 id. 379; Kreigh et al. *v.* City of Chicago, 86 id. 407; City of Alton *v.* Transportation Co., 12 id. 60; City of Quincy *v.* Jones, 76 id. 23; City of Chicago *v.* Rumsey, 87 id. 35.

The cases sustaining the grant of the privilege to construct a railroad track in a public street, are placed upon the ground that railways are improved highways, and subserve the public good as such, which reason fails here. G. B. and W. R. R. Co. *v.* Hartley, 67 Ill. 443; Stack *v.* City of East St. Louis, 85 id. 378.

The public are entitled to the use and enjoyment of the whole highway, and no individual can appropriate a portion of it to his own exclusive use. The King *v.* Russell, 6 East, 427; People *v.* City of St. Louis; 5 Gilm. 571; Hart *v.* Mayor of Albany, 5 Wend. 584.

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As to the jurisdiction of courts of equity to prevent a nuisance, or obstruction of a highway, by injunction: People *v.* City of St. Louis, 5 Gilm. 571; Green *v.* Oakes, 17 Ill. 249; Corning *v.* Lawrence, 6 Johns. Ch. 439; Hills *v.* Miller, 3 Paige, 254; Chicago and Vincennes R. R. Co. *v.* People, 92 Ill. 170.

If by contiguity be meant actual contact, then the property of complainants cannot be said to be contiguous; but this term, we conceive, is to be taken in a wider sense, so as to embrace property specially damaged by the obstruction. Green *v.* Oakes, 17 Ill. 250; Craig *v.* People, 47 id. 487; Carter *v.* Chicago, 57 id. 281; Corning *v.* Lawrence, 6 Johns. Ch. 254; High on Injunctions, sec. 528.

Messrs. Puterbaugh & Puterbaugh, for the appellee:

As to the power of a city to authorize the laying of a railroad track in and along its public streets, counsel cited Moses *v.* Pittsburgh, Ft. Wayne and Chicago R. R. Co., 21 Ill. 516; Murphy *v.* City of Chicago, 29 id. 279; Stetson *v.* Chicago and Evanston R. R. Co., 75 id. 74; Patterson *v.* Chicago, Danville and Vincennes R. R. Co., 75 id. 588; City of Quincy *v.* Chicago, Burlington and Quincy R. R. Co., 92 id. 23.

The laying of a railroad track upon a street will not be enjoined at the suit of an adjacent land owner, who simply owns up to the line of the street, and over whose land the road does not pass, where no special damage is shown to the complainant different from that to all the other property owners. High on Injunctions, secs. 522, 533; Bigelow *v.* Hartford, etc., 14 Conn. 565; O'Brien *v.* Norwich, etc., 17 id. 372; Frink *v.* Lawrence, 20 id. 117, and cases cited supra.

The rule requiring complainants to show a special injury peculiar to themselves, distinct from the general inconvenience experienced by the public, is inflexible. Corning *v.* Lawrence, 6 Johns. Ch. 439; McCowan *v.* Whitesides, 31 Ind. 235; Davis *v.* Mayor, 4 Kern. 506; Dawson *v.* St. Paul, etc., 15 Minn. 136; High on Injunctions, sec. 528.

Scott, J.—In view of the previous decisions of this court it will not be necessary to enter upon any elaborate discussion of the questions raised on this bill. Private individuals, owning property and carrying on business in the vicinity, seek to enjoin defendants from laying a side-track in the street in front of their own property, to connect with any railroad previously constructed in the street. It is alleged in the bill an ordinance was about to be passed by the city council of Peoria that would authorize defendants to do the acts the injunction was intended to prevent. Conceding, as the bill does, the ordinance of the city will warrant the action of defendants in constructing a railroad track in the street, it must be considered as definitely settled by the previous decisions of this court that equity will not entertain jurisdiction to restrain the contem-

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plated act. It is not alleged any portion of complainants' lands will be taken or touched by the proposed railroad track, nor are complainants abutting land owners. Their property is in the vicinity, on the same street, but not adjacent to the proposed improvement. The railroad track is to be constructed on the street, the fee of which, it is conceded, is in the corporation granting the privilege to lay such track. When this bill was filed, the side-track was not then constructed. It was to be built under, and in conformity with an ordinance of the city council. No direct injury would be done to complainants' lands, and at the utmost only consequential damages would be sustained. The nature and extent of such damages could only be ascertained after the completion of the work. It may be, if the ordinance granting the license shall be observed in the construction of the side-track, no serious detriment will result to complainants, or others from its construction. But be that as it may, the track is to be constructed on lands not owned by complainants, and under a license from the only party having lawful authority to grant the privilege, and any expected damages that may be sustained by reason of the proposed work can only be recovered in an action at law. Equity will not entertain jurisdiction to enjoin the proposed work. The rule of law on this subject is so well settled by previous decisions of this court, it is not deemed necessary to discuss it again as a new question. The following cases contain a full expression of the views of the court on the questions discussed by counsel in this case: Stetson *v.* Chicago and Evanston R. R. Co., 75 Ill. 74; Patterson *v.* Chicago, Danville and Vincennes R. R. Co., 75 id. 588; Peoria and Rock Island Ry. Co. *v.* Schertz, 84 id. 135; Cairo and Vincennes R. R. Co. *v.* The People, 92 id. 170.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MULKEY, J.—I do not concur in the decision of this case. It is, in my judgment, a new and dangerous departure from well established fundamental principles. The necessary effect of it will be to invite encroachments upon public rights for the benefit of a favored few, and place such as are unable to protect themselves at the mercy of those who, by their power and influence, are able to control municipal legislation in obtaining grants of exclusive privileges, often to the detriment, and sometimes ruin, of their less influential neighbors.

It is true the fee of the streets is generally, as in the present case, in the corporation, yet they are held in trust for the people generally, and can only be used for the ordinary purposes of streets. They cannot be lawfully used for any purpose which is not open alike to all classes of persons, without regard to whether they are powerful and influential, or otherwise. Any attempt on the part

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of municipal authorities to appropriate public streets, or any part of them, to the exclusive use or benefit of a mere private person or corporation, to the injury of neighboring proprietors, is a manifest breach of a public trust, and a flagrant outrage upon private rights, and a court of equity, in such cases, is the only forum that affords an adequate remedy. To say that equity will not interpose in such cases, to me seems like confounding all distinctions between equitable and legal remedies, and denying equitable jurisdiction in matters of trust,—a class of cases supposed by Story and other eminent authors to be cognizable in courts of equity only.

The present case is simply this: The municipal authorities granted to appellee, an extensive manufacturing company, the right to construct and put in operation a railway in one of the public streets of the city, to be used exclusively by the company in the transaction of its own private business, in which the public had no interest whatever. The direct effect of building and operating this railway will be to destroy the street altogether for the ordinary purposes of a highway, and thereby materially injure the property and business of appellants carried on upon and near the street in question, and the decision in the present case holds that equity will not interpose, by injunction, to prevent an injury of this kind. No authority is cited which sustains it, and I confidently assert none can be found. If the proposed railway, when put in operation, would be open to the public generally, then I concede, under the previous decisions of this court, an injunction would not lie at the suit of a private individual, however much he might be injured by the building and operating of such a road. But such is not the case here. The city had the right to permit a railway to be constructed in one of its streets which, when completed, would be open to the public generally, for the carriage of goods or passengers, or both, on equal terms to all; but it had no authority to permit such a road to be constructed or operated for the exclusive use of a mere private company. In the one case the city has a discretion to do or not do; in the other, there is no power to act at all. In the former case, equity will not interpose, but remit the parties to a court of law, and such relief as that tribunal affords. In the latter case, there being a total want of authority on the part of the city to act at all, and the attempt to do so being a clear breach of a public trust with respect to the ownership and control of the streets, a court of equity, according to all the authorities, should and does interpose.

If a city may make such a grant as this at all, it may absolutely fill a public street with mere private structures and enterprises, in which the public generally have not a particle of interest, to the detriment and utter ruin of other property and business in the neighborhood, and in such cases nothing but the restraining power of a court of equity affords anything like adequate relief. To remit

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him to a court of law, under such circumstances, amounts to a simple denial of justice. While a suit in a court of law, which has no power to avert the threatened injury until the rights of the parties are determined, is dragging its slow length along through the various courts to final determination, one's property and business may be broken up and ruined, and in the end of his suit at law he is only permitted to recover for the immediate results of the defendant's conduct. A flourishing and profitable business is gone, which he perhaps can never again restore. All his prospective profits are swept away from him by the wrongful act of the defendant, and he is not permitted to recover anything on account of them.

Under the present decision this almost fruitless suit at law is the only remedy which an enlightened jurisprudence affords. I repeat, this is simply a denial of justice. I hold it to be one of the highest duties of the courts of the country to steadily and firmly resist all encroachments of power upon the rights of the people. This, I submit, has not been done in the present case, and for this and other reasons already assigned, I respectfully, but earnestly, dissent from the conclusion reached by a majority of the court.

WALKER and DICKEY, J.J.—We fully concur in the views expressed in the above dissenting opinion.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

Per CURIAM.—The only question argued on the motion for a rehearing, and not discussed in the original opinion, that is deemed necessary now to be remarked upon is the point made that the side-track, although constructed under an ordinance of the city granting a license to lay it in a public street, is solely for the "convenience and benefit" of the corporation constructing it. This is a misapprehension of the law. Section 12, art. 11, of the constitution, provides, that "railways heretofore constructed or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." The track defendant was authorized by ordinance to construct, when completed and attached to the principal track, is as much a "public highway," in the sense that term is used in the constitution, as is the road of the company to which it is attached, and no doubt is entertained the company is subjected to the same duty to use it for the "convenience and benefit" of the public as any part of its main track.

It is different, as this court has decided in Kœlle *v.* Knecht, 99 Ill. 396, where such structures are built by individuals on their own lands for mere private use. But that is not the case here. This track was laid, or is to be laid, in a public street, under an ordi-

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nance of the city granting the privilege. It will be perceived, on examination, the ordinance contains nothing that indicates the switch, when built, was to be for the sole use of the corporation constructing it. On the contrary, the corporation, in its answer, denies it will prevent the use and occupation of the street by the public. Since its construction this switch is a part of the main track with which it is connected, and is in the same sense a "public highway," to be used by the company for the same purposes, "under such regulations as may be prescribed by law."

The petition for rehearing will be denied.

Rehearing denied.

Chicago and Western Indiana R. R. Co. et al.

v.

Eugene M. Dunbar et al.

(100 *Illinois Reports*, 110. *Sept.* 4, 1880.—*Rehearing denied Sept.* 30, 1881.)

A railroad company organized under the general law of March 1, 1872, has authority to select its own route, to lay out its road and to construct the same; and this power, by necessary implication, carries with it the power of fixing the terminal points of the proposed road, subject only to the limitation that the construction of its road upon or across any street in any city must be with the assent of the corporation of such city.

A railroad company, as a general rule, may select its own route, fix its terminal points, and lay out its road and acquire the right of way and other property necessary for the construction of its road on any and every part of its line, whether within city limits or without them, according to its own discretion. The lines selected may, without the assent of the city, cross streets, and the company may, without such assent, acquire the right of way and construct its road on every part of such line, except the parts to be constructed upon or across streets.

Under the present legislation, it is not necessary, as a condition precedent to the location of its line within a city by a railroad company, or to the construction of its railroad within the city, or such parts of its lines as are not within any street, or to the power to condemn any private property within the city for such purpose, that any ordinance should be passed by the city council either giving assent for the construction of the road upon or across streets, or providing for the location of the road.

A city ordinance granting permission to a railroad company to construct and operate a railroad within the city limits, is not void because it fails to designate the precise line upon which the road may be constructed, and omits to designate the precise points at which the road may be constructed across and upon the several streets to be intersected by it.

Permission granted by a city council to a railroad company to construct its road across streets at any points to be selected by the company within a given district, is not a delegation to the company of powers which can only be exercised by the council, as the power to locate the line of the road is given by statute to the railroad company alone, and not to the city authorities. The

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city of Chicago has power to make provision for the location of a railroad within its limits, but no power to locate. That power is in the railroad company, subject to such provisions for the location as the city council may make.

The mere existence of a power in a city council "to provide for the location, grade and crossings" of railroads within the city, and "to change the location, grade and crossings" of railroads, until exercised, is no limitation upon the power of a railroad company to select its route and locate its road within the city.

The clause in the city act that "the city council shall have no power to grant the use of or the right to lay down any railroad tracks in any street" of the city, "except upon petitions of the owners of the lands representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes," has reference only to cases where the city may propose to grant the privilege to a railroad company to run along a street for a given distance, and not to a case where the road merely crosses a street.

A provision in a city ordinance that the permission to construct a railroad within the city is upon condition that the railroad company shall permit any other railroad companies, not exceeding two in number, which have not then the right of entrance into the city, to use the main track of the road therein authorized to be laid, jointly with such road so authorized, does not render the ordinance invalid, as it confers upon the railroad company no power not given it by law, nor does it deprive the city of any power whatever.

The law authorizing the condemnation of private property for railroad purposes, is limited to such property as is necessary for the purpose in question, and no condemnation proceedings can lawfully be had of property not necessary for the construction or use of the road. But this necessity need not be made certain before it is lawful to proceed with the condemnation.

The provision of the general Railroad Act of 1849, prohibiting railroads from entering cities without municipal consent, if not repealed by implication by the act of 1872, is wholly so by the act of March 31, 1874.

AGREED case from the Superior Court of Cook county; the Hon. John A. Jameson, Judge, presiding.

The following are the facts shown in the records in this case: On the 4th of June, 1879, the Chicago and Western Indiana R. R. Co. was duly organized under the general law of this State in force July 1, 1872, which provides for the incorporation of such corporations, and defines their powers. (Rev. Stat. 799.) The purpose and object of the corporation, as stated in articles of association, was to construct and operate a railroad, the line of which "will begin at a point on the boundary line between the States of Illinois and Indiana, in the south-easterly part of Thornton township, Cook county; thence through or near the town of Dalton to such terminus in the city of Chicago as may be selected by said corporation,—all such line of railroad being in Cook county, Illinois."

On the 15th of September, 1879, the city council, at the request of said corporation, adopted an ordinance, of which the following is a copy:

"Be it ordained by the City Council of the City of Chicago:

"SECTION 1. That permission and authority be and the same

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is hereby given and granted to the Chicago and Western Indiana Railroad Company to lay down, maintain and operate a railroad, with one or more tracks, and such switches, sidings and turn-outs as may be necessary, along and upon the following route in the city of Chicago, to-wit: Commencing at the southern boundary line of the city of Chicago, at some point within one hundred feet of the west line of Stewart avenue, and thence northwardly over such lots, lands and property as the said company now owns or hereafter may acquire, by lease, purchase, condemnation or otherwise, parallel to said Stewart avenue, to the intersection of Grove street and said Stewart avenue, and thence over and upon such lots, lands and property as the said company now owns or hereafter may acquire, by lease, purchase, condemnation or otherwise, unto such terminus as it may establish between the east bank of the south branch of the Chicago river and the west side of State street, and between Sixteenth street and the south line of Van Buren street, in said city.

"Sec. 2. The said railroad company may cross any and all intervening streets, alleys and railroad tracks upon or along the line of the said route, as designated in the first section, said company to be subject at all times to the direction of the department of public works, or other proper department or officer of said city, in the construction of its said tracks, in making the crossings or connections with other roads, and the keeping in repair of so much of said streets, alleys and crossings as may be occupied by said railroad company with its tracks, switches and turn-outs.

"Sec. 3. The said railroad company may, and it is hereby authorized to, lay down, maintain and operate one or more railroad tracks, with such turn-outs, side-tracks and switches as it shall deem necessary, over and across any land which it may acquire upon the line of said route, by lease, purchase, condemnation or otherwise; and the said railroad company may use and operate the railroad tracks hereby authorized to be laid, with locomotive engines and cars, subject to all ordinances of the city of Chicago applicable to railroads which are now or hereafter may be in force.

"Sec. 4. The permission, authority and privileges hereby granted are upon the express condition that the said railroad company shall erect and maintain viaducts over any of its said tracks, on any street or streets of said city which may be crossed by its said tracks, where and as the said city council may from time to time require, and under the supervision of the department of public works, or other proper department or officer of said city, and erect and construct the approaches to all such viaducts, with proper areas on either side of such approaches: Provided, however, that where any such viaduct cannot be built at any such street crossing without the same be built over the track or tracks of some other railroad company or companies, then the said Chicago and Western Indiana

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Railroad Company shall only be obliged to join with such other last mentioned railroad company or companies in the construction and maintenance of such viaduct, and to pay their fair proportion of such viaduct or viaducts; and if such other railroad company or companies shall not join in the erection of any such viaduct, then, when the proportion of such other company or companies shall be otherwise provided, the said Chicago and Western Indiana Railroad Company shall pay its fair proportion of the cost of any such viaduct.

"Sec. 5. The said railroad company shall be subject to all general laws and ordinances of the city of Chicago in relation to railroads, which are now or may hereafter be in force.

"Sec. 6. The permission and authority hereby granted are upon the further express condition, that the said railroad company shall and will forever indemnify and save harmless the city of Chicago against and from any and all damages, judgments, decrees and costs and expenses of the same which it may suffer, or which may be recovered or obtained against said city, for or by reason of the granting of such privileges and authority, or for or by reason of, or growing out of or resulting from, the passage of the ordinance, or any matter or thing connected therewith, or with the exercise by said company of the privileges hereby granted, or from any act or acts of the said company under or by virtue of the provisions of this ordinance.

"Sec. 7. The permission and authority herein granted are upon the further express condition, to wit: That said railway company shall permit any corporation, person or persons, duly authorized by ordinance of said city, to construct side-tracks to intersect any track or tracks of said railroad company within the limits of said city, for the purpose of conveying property to and from such railroad to any warehouse, lumber yard, coal yard, or any manufactory situated within one thousand feet of said railroad; and upon reasonable compensation being made therefor, shall, at all times, permit the owners or lessees of any such side-track, or the consignees of any property, to take the cars containing such property to him or them consigned, to any such warehouse, lumber yard, coal yard or manufactory, situated upon any such side-track: Provided, however, that any cars so taken shall be returned without any unnecessary delay, and that any such owner, lessee or person conducting or carrying on any such warehouse, lumber yard, coal yard or manufactory, shall be entitled to have any property taken from any such warehouse, lumber yard, coal yard or manufactory, over any such side-track, to and upon the tracks of said railroad, under the directions and regulations, to said railroad company, without unreasonable delay: And provided further, that the privileges authorized herein are granted upon the express condition that the Chicago and Western Indiana Railroad Company shall permit any

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other railroad companies, not exceeding two in number, which have not at present any right of entrance into the city of Chicago under any existing ordinance, to use the said main railroad tracks herein authorized to be laid jointly with the said Chicago and Western Indiana Railroad Company, upon such fair and equitable terms as may be agreed upon by said companies; and in event that said companies cannot agree upon such terms, the same shall be settled by three disinterested persons, one to be selected by said Chicago and Western Indiana Railroad Company, one to be named by such other company as may desire to use said tracks, and the third by said two persons, and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said companies, respectively, shall use and occupy said tracks; and upon the further express conditions that said Chicago and Western Indiana Railroad Company, and any other railroad company or companies that shall construct or operate said railroad under this ordinance, or under lease from or contract with the said Chicago and Western Indiana Railroad Company, shall be held jointly bound to pay all legal damages that may accrue to the owners of property by reason of the construction or operation of said railroad under the ordinance.

"Sec. 8. The privilege and authority hereby granted are so granted upon the further express condition that the tracks authorized by this ordinance shall be laid down and constructed within one year from the passage of this ordinance; and if not so constructed and in operation, all the rights and privileges granted by this ordinance to such company shall cease, and be null and void.

"Sec. 9. This ordinance shall be in force from and after its passage."

This ordinance was passed without any previous petition by the owners of property fronting upon any of the streets or alleys intersected or to be intersected by the line of said railroad, asking that the consent of the city should be given to the railroad company to lay down its tracks over or across any of such streets or alleys.

Before the adoption of this ordinance, the railroad company had located and surveyed its line from the point on the State line to a point on the south boundary of the city of Chicago, and had selected a contemplated line in the city, within the bounds named in the ordinance, and had purchased large amounts of lots and lands on and near its proposed line. After the passage of the ordinance, and before the filing of the bill in this case, the railroad company had fixed its northern terminus on the south side of Van Buren street, between State Street and Dearborn, and had surveyed and located its main line from the south boundary of the city of Chicago, running northward, immediately west of and adjoining the western line of Stewarts avenue, a distance of about two and one-half

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miles, to the intersection of Grove street, and there crossing Stewart avenue and Grove street diagonally in a more easterly direction, and thence in a north-easterly direction between Grove street and the south branch of the Chicago river, crossing Eighteenth street and Sixteenth street, and intersecting Clark street near the crossing of the Chicago, Burlington and Quincy railroad, and Dearborn street at the intersection of that street and Fifteenth street, thence nearly due north to Twelfth street; and before the filing of the bill this railroad company had acquired title (chiefly by purchase) to all the private property on which its main tracks are located, from the south boundary of the city northward to Grove street, embracing a strip of such property lying next west of Stewart avenue, for the whole of that distance, at least forty-eight feet wide in every part thereof, and in other parts wider; and had acquired title to large portions of property along its line between Stewart avenue and Twelfth street; and had become the owner of the lots adjoining the streets on both sides thereof, at every point where such line intersects a street, in its whole course, from the south boundary of the city to the south side of Twelfth street, on its line. In addition, the corporation had bought large amounts of real estate north of Twelfth street and south of Van Buren street, on or near the route of its proposed line, to its northern terminus, on the south side of Van Buren street and between Dearborn and State streets.

This corporation had also constructed its road from the south boundary of the city to the intersection of Archer avenue, and had there established a passenger station, and had constructed on its own land, and adjoining its tracks, at a point next south of Thirty-third street, an engine house, turn-table and repair shop, and constructed a yard, with side-tracks and switches, and had constructed a considerable portion of its track as far north as Twelfth street, and near Twelfth street had built a large and expensive freight depot, and for a time had had its road in actual operation as far north as Archer avenue, running four trains daily thereon, carrying passengers, freight and the United States mail; and in all this had expended, before the filing of this bill, more than one million of dollars within the city of Chicago.

The Chicago and Western Indiana R. R. Co., before the filing of the bill, had made with the Chicago and Eastern Illinois R. R. Co. a contract of perpetual lease and user of its track, from the point of junction of the two railroads, at a point about twenty miles south of Chicago, to and into the city of Chicago; and that company was, before the bill was filed, running daily trains on the line as far north as Archer avenue, and had made arrangements to run its freight trains to the depot on Twelfth street, and its passenger trains to the proposed terminus on Van Buren street, as soon as the road can be put in readiness for that purpose.

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One of the appellees (Dunbar) owns a lot on Thirty-seventh street, about twenty-four feet wide and perhaps one hundred and fifty feet long, lying adjoining and next west of the ground on which the railroad track is built, and about two blocks north of the south boundary of the city. The other appellee (Valentine) owns a lot of about the same size, lying just south of Thirty-eighth street, and from seventy-five to one hundred feet from and west of the line of the railroad track, and about one block from the south boundary of the city.

This is a bill by complainants, Dunbar and Valentine, charging that the Chicago and Western Indiana R. R. Co. have begun proceedings in the county court of Cook county, under the eminent domain laws, to condemn the lot of Dunbar for the use of the railroad company, and that the operation of the railroad in the vicinity of Valentine's lot will damage the use and value thereof by the casting of smoke, ashes and cinders upon it from passing engines, and by the noise of engines and trains, and will obstruct the free passage to and from the front of his lot on Thirty-eighth street; and they join in asking an injunction to restrain the said railroad company from proceeding farther in the construction of its road, and restraining both railroad companies from operating the same, and forbidding the first railroad company to move farther in the proceeding in condemnation of the property of Dunbar.

The Superior Court of Cook county heard the case upon bill and answer, and, contrary to his view of the law, as expressed at the time by the then presiding judge, entered a decree pro forma, that said ordinance is illegal and void upon its face; that said ordinance is also illegal and void because no petition of property owners was filed prior to its passage; that the passage of a valid ordinance locating the precise route of the railroad, and consenting to the crossing of the streets and alleys upon such route, is a condition precedent to the exercise by the railroad company of the power of eminent domain to acquire private property within the city; that in the absence of such an ordinance, a court of chancery has the power to enjoin the prosecution of condemnation proceedings; that the actual location and construction of the railroad within the city of Chicago, under the ordinance in question and under the circumstances detailed in the answers, is not a valid location of said line of railroad; that the complainant has the right to relief in a court of equity against the acts of the defendant complained of in the bill; and in pursuance of the said decision, the court ordered, adjudged and decreed that the injunction theretofore granted, prohibiting the Chicago and Western Indiana R. R. Co. from proceeding to finish and operate its railroad within the city of Chicago, and from proceeding further in the proceedings begun for the condemnation of the land of Dunbar, should be made perpetual.

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Messrs. Lawrence, Campbell & Lawrence, and Mr. Henry Crawford, for the railway company, after stating the facts and questions in the case, made the following among various other points:

The nature of the corporate power to locate or select the route of a railroad has been frequently under discussion in this and other courts, and with entire unanimity the decisions announce the doctrine that such discretion, when expressly delegated by the General Assembly, and not wantonly exercised, is conclusive, and not subject to review; citing Park's Appeal, 64 Pa. St. 141; Boston and Providence R. R. Co. *v.* Midland R. R. Co. 1 Gray, 364; Spring *v.* Connecticut River R. R. Co., 4 Cush. 69; South River R. R. Co. *v.* Stoddard, 6 Minn. 150; N. Y. and H. R. R. Co. *v.* Kip, 46 N. Y. 553; Stock and Dar. R. C. *v.* Brown, 9 Hoff. L. 255; Illinois Central R. R. *v.* Rucker, 14 Ill. 153; Chicago, Burlington and Quincy R. R. Co. *v.* Wilson, 17 id. 123; Chicago, Rock Island and Pacific R. R. Co. *v.* Joliet, 79 id. 35; Same *v.* Town of Lake, 71 id. 337; Dunham *v.* Hyde Park, 75 id. 374; Boston *v.* Walhen, 60 id. 138; St. Louis, J. and C. R. R. Co. *v.* Mather, 71 id. 592; Marsh *v.* F. P. and N. W. R. R. Co., 64 id. 461.

The power to construct a railway across, along, or upon the streets of a city, is subject to but two restrictions by the general Railroad act:

First—"The corporation shall restore the street thus intersected to its former state, or to such a state as not unnecessarily to leave impaired its usefulness and keep such crossing in repair."

Second—"The assent of the corporation of such city, town, or village."

The first is a condition subsequent, and the latter a condition precedent, to the exercise of the power to lay tracks, either across or lengthwise upon the street; but the manner in which this municipal assent is to be expressed is not designated in this nor in the City act.

It is clear that the proviso in the 5th item of section 19 has exclusive reference to the assent of the city as the owner of the streets, and not to any act done in its legislative capacity; citing Moses *v.* Pittsburg, Ft. Wayne, etc., Railroad Co., 21 Ill. 522; C. C. R. W. Co. *v.* The People, 73 id. 533; W. D. Ry, Co. *v.* Met. Ry. Co. 87 id. 317; The People *v.* Gas Light Co., 38 Mich. 154.

That a grant of the right of way over private property may be lawfully made before the road is located, and without specifying the exact route, has been repeatedly adjudged; citing Morris *v.* Illinois, Bloomington and Western Ry. Co., 76 Ill. 522; Ross *v.* Chicago, Burlington and Quincy Railroad Co., 77 id. 135; Conwell *v.* Railroad Co., 81 id. 234; Munkers *v.* Kansas City, etc., Railroad Co., 60 Mo. 338; Leavenworth Railroad Co. *v.* United States, 2 Otto, 741.

An ordinance should receive a reasonable construction, so as to

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make the same valid, if it can be done. 1 Dillon on Mun. Corp., sec. 353; Whitlock *v.* West, 26 Conn. 409.

Where a discretionary power is conferred upon a municipal corporation, it follows that the judicial department cannot annul the act done in the discretion of the body, nor substitute its own. 1 Dill. sec. 59; Mayor *v.* B. and O. Railroad, 21 Md. 92; Com. *v.* Morristown, 18 N. J. (Eq.) 305; McCullough *v.* Maryland, 4 Wheat. 316; Covington *v.* East St. Louis, 78 Ill. 552; Chicago Packing Co. *v.* Chicago, 88 id. 225; North Cent. Railroad *v.* Baltimore, 21 Md. 104.

Many city ordinances providing no location, except by giving choice within a reasonable area, have been sustained by this court. Illinois Central Railroad *v.* Rucker, 14 Ill. 353; Moses *v.* Pittsburg, Fort Wayne and Chicago Railroad, 21 id. 516; Murphy *v.* Chicago, 29 id. 279; Evans *v.* Chicago, 24 id. 52; Stetson *v.* C. and E. Railroad Co. 75 id. 74; Indianapolis, Bloomington and Western Railroad *v.* Hartley, 67 id. 441; Patterson *v.* C., D. and V. Railroad, 75 id. 590.

It has been the universal method adopted in other States not to make any precise location of the route within cities, but leave the discretion to select the actual line to the company. Tate *v.* Ohio and Mississippi Railroad Co., 7 Ind. 479; I. and C. Railroad Co. *v.* Lawrenceburg, 37 id. 489; Milburn *v.* C. R. R., 12 Iowa, 240; Slatten *v.* Des Moines, 29 id. 148; Mercer *v.* Pittsburg, Ft. Wayne and Chicago Railroad, 36 Pa. St. 99; Pacific Railroad *v.* Leavenworth, 1 Dill. 393.

Mr. ALBERT H. VEEDER, and Messrs. DENT & BLACK, for Dunbar and others, after stating the case and questions presented by the agreed statement of facts, made the following among other points in their printed argument:

That no railroad company organized under the general Railroad act of 1872 can have any authority or operate a road within the confines of a city organized under the act of 1872, until that city has legally provided for the location of that road within its limits, which provision can only be evidenced by some formal legislative enactment, passed by the city council, under the power and duty devolved upon it by paragraph 25 of section 62 of the general City act. (Hurd's Stat. 1877, p. 210.) And that no railroad corporation standing within a city as a mere unlawful intruder, without the legal power or right to construct its road within the city, can lawfully invoke the provisions of the Eminent Domain act for the condemnation and taking of private property.

It is necessary to constitute a valid ordinance in such a case, first, that it should definitely locate the route of the proposed road, and that any delegation of the power to locate such route to the company itself was an unauthorized delegation of power, and an abandonment of the duty devolving upon the common council, vitiating the

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ordinance; and, second, that as a condition precedent to the passage of any such ordinance, when it appeared on the face of the ordinance that various streets of the city, or parts of such streets, would have to be used in the construction of the proposed road, there should be a petition of the property owners, in pursuance of paragraph 90 of section 62 of the general City act.

The provisions of section 7 of the ordinance are illegal, and render the ordinance invalid. By it there is a grant, by necessary implication, not only to the railroad company in question, but to any other railroad company or companies with which it might make arrangements to construct and operate the road. It casts the obligation on the Chicago and Western Indiana R. R. Co. to allow at least two other roads to use its tracks, with no limitation upon that company to restrain it from allowing the use of its tracks, not by two only, but by ten or a hundred companies. This ordinance therefore embodied a grant that may be almost indefinitely extended. Is not this a plain violation of the trust committed to the city council?

It will be observed that this ordinance, by section 7, reserves no control to the city council. If the ordinance is valid, any number of such corporations may enter the city in defiance of the council and the entire power of the city.

Mr. CHARLES H. MORSE, also for Dunbar and others, among others made the following points:

The power of eminent domain must and does have its origin alone in the public necessity, and the measure of that necessity must be and is the measure of the power. Citing many acts of the legislature.

In every case in which a railway company formed under the general act of March 1, 1872, sues for the condemnation of any particular piece of land, the question whether such land is necessary or not for the construction and operation of the railway and its necessary accommodations, is a question for the courts to determine. Reed *v.* Louisville Bridge Co., 8 Bush, 69; Hill *v.* Western Vermont Ry. Co., 32 Vt. 68.

No land whatever can be condemned for the construction and use of any railroad, or its necessary accommodations, until the line of route over which such railway is to be constructed has been first located by some one invested with the authority of law for that purpose, nor until the width of such route, and the space to be occupied by such road, has been definitely fixed by some one lawfully authorized to perform that office. Darlington *v.* United States, 82 Pa. St., decided in 1876; O'Hara *v.* Pennsylvania R. R. Co., 1 Casey, 448; Neal *v.* Pittsburg and Connellsville R. R. Co., 4 id. 19.

With whom have the laws of Illinois lodged the power to locate the route, etc., of the Chicago and Western Indiana R. R. Co., or any other steam railway company formed under our general

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Railroad act, within the city of Chicago? We answer, unhesitatingly and emphatically, with the city council of Chicago, and with that body alone. (General Railroad act in force March 1, 1872, and the act for the incorporation of cities, etc., approved April 10, 1872.)

Messrs. Leaming and Thompson, on the same side.

The city council had no jurisdiction to pass the ordinance in question, for want of a petition of the property holders interested in the location of the road. State *v.* Council of Elizabeth, 30 N. J. (1 Vroom) 176; Dillon on Mun. Corp., sec. 639; Swift *v.* Williamsburg, 24 Barb. 427; Litchfield *v.* Vernon, 41 N. Y. 123; Holland *v.* Baltimore, 11 Md. 186.

DICKEY, C. J.—The decree in this case is clearly erroneous. Under the present laws of Illinois a railroad company organized under the general law of March 1, 1872, has express authority to select its own route, to lay out its road and to construct the same. This power necessarily includes the power of fixing the terminal points of the proposed road. (Rev. Stat. 1874, p. 803, sec. 20.) This is made exceedingly clear when we read section 29 of that statute, wherein old companies (organized under the act of 1849, but whose terminal points had not been fixed by the General Assembly) are authorized, if they adopt this act, to proceed thereunder and have all the benefits thereof. And it is declared that "the fixing of the termini by any such corporation shall have the same effect as if fixed by the General Assembly." This necessarily implies that the benefits of this act carry with them the power to fix terminal points.

The power thus given is, however, subject to a limitation found in the fifth clause of section 20 of the act, wherein it is declared nothing in this act shall authorize "the construction of any railroad upon or across any street in any city . . . without the assent of the corporation of such city." This is the only limitation upon the powers of the railroad company, in this regard, found in the railroad act. If there be no other limitation of this power by other statutes, it is obvious such a railroad company may, as a general rule, select its own route, fix its terminal points and lay out its road, and acquire the right of way and other property necessary for the construction of its road on any and every part of its line, whether within the city limits or without them, according to its own discretion, for this limitation, by its terms, is confined to the construction of the railroad upon or across streets. The line selected may, without the assent of the city, cross streets, and the company may, without such assent and without violating this limitation, acquire the right of way and construct its road in such cases on every part of such line, except the parts to be constructed upon or across streets. That part of the construction, and that alone, is,

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by this limitation, forbidden to be done without the assent of the city.

But it is suggested, that the mere existence of the power possessed by the city council of Chicago "to provide for the location, grade and crossings" of railroads within the city, and "to change the location, grade and crossings" of railroads, is a further limitation upon such power of the railroad company. It is not perceived how this can be so. Congress has power "to provide for organizing, arming and disciplining the militia," but in the absence of any law of Congress on that subject, State laws may be passed on that subject. The city possesses the power to act on this subject, but the mere existence of the power can have no effect unless it is exercised by the city. The city council has the power, by law, to regulate and control the use of landing places, wharfs, docks and levees; also, the anchorage, moorage and landing of all water craft and their cargoes within the city, and to make regulations in regard to the use of harbors; but it is not conceived that the mere possession of such powers by the city council, in the absence of the exercise of the same, renders it unlawful for any one to use landing places, wharfs, docks or levees within the city, or makes it unlawful to use the harbor, anchor or moor vessels therein, or to land water craft or their cargoes. All these things may be done lawfully, so long as there is no ordinance forbidding the same. The city council also possesses the power "to direct the location" of packing houses, and breweries, and livery stables, and blacksmith shops; but it is not conceived that the mere existence of the power, so long as it is not exercised, renders it unlawful to erect and construct within the limits of the city such establishments. The power to interfere by such regulations and provisions, does not of itself constitute an interference. The statute has nowhere said, either expressly or by implication, that no livery stable or blacksmith shop shall be built in the city until the city council has exercised its power to direct the location thereof; nor has the statute, either expressly or by implication, said that no railroad shall be located or constructed within the city limits until the city council has exercised its power to provide for the location thereof. Let it be observed, the city council has no power (strictly speaking) to locate a railroad. That power is conferred upon the railroad company. The power of the city is to provide for the location of the railroad by the railroad company, for by law no one other than the railroad company has the power of location. That power is conferred on the railroad company alone, and not upon the city; but it must be exercised by the railroad company subject to such provision, if any, as the city council may lawfully make. The railroad company may, subject to such power in cities and villages, exercise by law all the powers granted by the Railroad act, and the only condition precedent found in the laws as they now stand, is, that the assent of the

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corporation of the city must be obtained before it may lawfully construct its road upon or across a public street in a city.

This has not always been the law in this State. By the general law of 1849 for the incorporation of railroad companies, such companies had not the power to effectively locate their line and fix their terminal points, or exercise the power of eminent domain, until the proposed route and termini were approved by the General Assembly. And it was provided in that statute, that nothing in that act should authorize the company to make "a location of their track within any city without the consent of the common council of such city." So long as that statute was in force, it would seem that such company could not lawfully locate any part of their line or construct the same within any city, or proceed to condemn private property for corporate purposes within any city, until the consent of the common council was first obtained. But this section of the act of 1849 is expressly repealed by the act of March 1, 1872, and in lieu of it we have the provision that such company shall not construct its "railroad upon or across any street in any city" without the assent of the city. There is no longer any prohibition (by statute) against locating the route in any part of the city. The prohibition is now confined to the use of streets, and all other parts of the city become open to the operations of the railroad company, until some provision limiting the same is made by the city council. There is no longer any prohibition against the location of the line, even across or upon streets. The present prohibition of the statute relates alone to the construction of the road upon or across streets. It is not for the courts to judge whether changes in the law made by the General Assembly are wise or unwise, beneficial or otherwise. It is enough that the law is changed. The act of 1872 in this regard differs from the act of 1849, not only in the form of its words, but in their scope and meaning. We are not at liberty to disregard a plain change in the law.

The law authorizing the condemnation of private property for railroad purposes is limited to such property as is necessary for the purpose in question, and no condemnation proceedings can lawfully be had of property not necessary for the construction or use of the railroad; and it is most strenuously insisted that this necessity must be made certain before it is lawful to proceed with condemnation, and that it cannot be made to appear that private property within a city will certainly be needed for the construction and use of the railroad company, until the consent of the corporation of the city has been lawfully obtained for the crossing of the streets, and that for that reason the passage of a valid ordinance in this regard is an essential condition precedent to the exercise of the power of condemning private property within the city by the railroad company. The law in no way provides the order in which the railroad

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company shall proceed in acquiring its right of way. The law does provide the mode in which this right of way may be acquired. Private property may be acquired by purchase or condemnation. (Secs. 18–20 of the railroad act.) Land along highways, plank roads, turnpikes and canals can be obtained "by the consent of the lawful authorities having control or jurisdiction of the same, or by condemnation." (Sec. 20.) And the right of way for crossing or uniting with other railways may be acquired as provided in section 20, and the right of way upon or across streets in cities, incorporated towns or villages may be acquired by the assent of the corporation of such city, town or village. The law has provided one mode of acquiring the right of way across private property, and another mode of acquiring the right of way across streets, but the law has in no way provided the order in which the railroad company shall proceed in acquiring its right of way.

If the position of counsel in this regard be sound, it is difficult to perceive how a railroad company could ever proceed to condemn property on any part of its line. It must begin somewhere. And in the first proceedings to condemn, no matter on what part of the line, it might as well be urged by the owner of the property proposed to be taken in such case, that it did not appear that his property was necessary for the corporate purposes until the railroad company should have acquired the right of way on all other parts of the line, and the right to cross all streets of cities or of villages upon the proposed line, for the company might not succeed in getting the right of way elsewhere. It has been the usage of railroad companies in this State for many years to proceed in their discretion, on the question of the right of way on certain parts of the line, without being required to acquire the right of way in any one part of the line before proceeding to acquire the right of way in another part of the line. In fact, it has been common to proceed in the matter of acquiring the right of way, by condemnation and otherwise, when only a part of the line had been located, and before the entire line had been located.

We are not aware that this position, or any position akin to it, was ever assumed, until taken in the case of Metropolitan Ry. Co. *v.* Chicago West Division Ry. Co., 87 Ill. 317. In that case it was insisted that the granting by the city council to the Metropolitan Ry. Co. of the privilege of using the street in question for railroad purposes, was an essential condition precedent to the right of that company to proceed with its condemnation of private property for corporate purposes, and it was there contended that the ordinance for that purpose, in that case, was invalid, because not legally enacted. This court there said: "The necessity for considering whether that ordinance (giving consent of common council) was legally enacted . . . is not perceived, so far as it can have any direct bearing on the decision of this case. . . . Obtaining the

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consent of the common council of the city for laying the track of the petitioner's railway in any given street, is not a condition precedent to condemning such property and interest or privilege as the defendant may have previously acquired, by contract or otherwise, in such streets. That consent may, with equal propriety, be obtained afterwards, and it is immaterial when it is secured." And again it is said, the question of the legality of the ordinance "is not a question that in any degree affects petitioner's right to condemn the property of defendant, or any one else, for the purposes of its organization."

It would seem, then, that under the present law it is not necessary as a condition precedent to the location of its line within the city by a railroad company, or to the construction of its railroad within the city on such parts of its line as are not within any street, or to its power to condemn private property within the city necessary for such purpose, that any ordinance whatsoever should be passed by the city council, either giving assent for the construction of the railroad upon or across streets, or providing for the location of the railroad. It is not necessary, however, in the decision of this case, that we should go to that extent in the construction of these statutes. In this case the city council of the city of Chicago has passed an ordinance by which the assent of the corporation of the city is expressly given for the construction of this railroad across the streets intersected by its line as located, and also providing for the location of this railroad within the limits of the city; and it is not alleged that the location of the road is in any respect made in violation of the ordinance in question.

It is, however, insisted that this ordinance is void, because it fails to designate the precise line upon which the railroad may be constructed, and omits to designate the precise point at which the road may be constructed across and upon the several streets to be intersected by the railroad. The statute nowhere, expressly or by any reasonable implication, requires such precise certainty. The General Assembly has clothed the city council in general terms with power to provide for the location of railroads within the city, and with power to grant or refuse its assent to the construction of any railroad upon or across streets within the city. The statute does not say how these powers, or either of them, shall be exercised. It surely does not say that no such assent shall be granted except in cases where the points in the streets to be crossed are precisely designated, or that provision for the location shall define precisely the line. The statute itself gives the consent of the State to the construction of such railroads across public highways and navigable streams, without defining the line of the road; and no reason is perceived why the city council may not select its own mode of granting like consent of the city in relation to streets, and also select its own mode of making provisions for the location of the railroad.

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The statute has not prescribed either the mode or the time in which either of these powers shall be exercised,—all that is obviously left to the judgment and discretion of the city council, in each case.

We seek in vain in the language of these statutes for any provision indicating that these powers can only be lawfully exercised on a line precisely defined. The legislature has not prescribed what shall be the limits of the consent of the city as to the crossing of the streets. Obviously that consent may be granted (if the city council think it wise to do so) without specifying the precise point at which the street shall be crossed. The same is true in relation to the exercise of the power "to provide for the location" of the railroad.

Under the old statute, and under the powers of the old charter, when no railroad corporation was allowed even to make a location of its track within a city without the consent of the common council, and when the city had the power "to direct and control the location of railroad tracks," it was never the practice of the city of Chicago, nor of any other city similarly situated, in making provision for the location of railroad tracks, or in giving its consent to the crossing and use of streets, to define precisely the line upon which such railroad track should be located and constructed. No precedent has been brought to our attention of any provision for the location of any railroad, either by the act of the legislature (when special charters were granted) or by any ordinance enacted by any city upon the subject, wherein the precise line of the location of the road was defined in the ordinance or statute; and yet our statute books, and the city ordinances of our large cities, are full of provisions made for the location of railroads, and giving consent to railroad companies to use streets, and to cross them.

In the charter under which the Chicago and Rock Island R. R. was constructed is found the following: "The said company shall not be authorized to locate its track within the city of Chicago without the consent of the common council." Under that act, the common council, in May, 1851, passed an ordinance providing "that the Rock Island and Chicago R. R. Co. may lay down in any one of the streets of said city, between the west line of State street and the west line of Halsted street, from the south line of said city as far north as the north line of Polk street, a single railroad track, with necessary turn-outs and turning-tables. Said company may extend said track northwardly as far as the south line of Van Buren street, upon any street between the west line of Clark street and the west line of Halsted street, and build all the necessary turn-outs and turning-tables. Said company may also construct in said city one or more railroad tracks, within the boundaries aforesaid, upon any land they may procure, by purchase or otherwise, and may also construct and use all depots which may be necessary to accommodate the business of said company." Under that ordinance the Rock Island R. R. was brought

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into the city of Chicago nearly thirty years ago, its track constructed, and its depots erected. It has been in operation ever since, and we are not advised that its right to enter the city and condemn property therein for corporate purposes was ever questioned.

Without following out in detail the provisions of the several charters of the respective railroads, or the provisions of the several ordinances by which the railroads have been permitted to enter cities, it may be safely affirmed that in most cases the railroad company was not permitted to enter the city with its road, or to cross its streets, without the consent of the city authorities, and that in most cases, if not in every case, where the consent of a city has been granted, the ordinance granting the consent has made provision for the construction of the line within a defined district, and has omitted to define the precise line upon which the railroad should be constructed or the streets crossed.

Our attention has been called to many ordinances of the city of Chicago granting permission to railroads to enter the city, and to cross streets in Chicago. Among others, we find such ordinances relating to the Chicago, St. Charles and Mississippi Air-Line R. R., the Chicago and Canada Southern R. R., the Chicago and Illinois River R. R., the Chicago, Burlington and Quincy R. R., the Chicago and Pacific R. R., the Chicago and Evanston R. R., the Illinois and Wisconsin R. R., the Chicago and Great Eastern Ry., and to the Fort Wayne and Chicago Ry., and in every one of these cases the consent or permission to enter the city and to cross streets was granted to the railroad company by the city, without defining the precise line upon which the track should be located or on which the crossings should be made. In each case permission was given to cross the streets within a district defined in the ordinance. This mode of granting the consent or permitting railroads to enter cities under the former laws without defining the precise track, and by simply defining a district within which it might be located, was so universal that it must have been known to the General Assembly when the general Railroad act of 1872, and the general act in relation to cities and villages, in 1872, were enacted. Had it been intended by the General Assembly to prohibit that mode of granting the license or permission in question by city councils, some language for that purpose would undoubtedly have been used, more definite than that found in either of those statutes.

We find no vital objection to this ordinance on the ground that the route of the railroad is not therein defined with more certainty.

It is insisted by appellees that the permission to construct the road across streets at any point to be selected by the railroad company within a given district, is a delegation to the railroad com-

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pany of powers which can only be exercised by the city council, and that the ordinance is therefore invalid. This does not seem to be so. The railroad company derives its power to locate its road from the act of the legislature, subject to such restraint as the city council may lawfully exercise under the provisions of the act in relation to cities. It is said by counsel for appellees, "the duty" of locating the rout within the city, of each railroad, is imposed upon the city council by the City act. This is a misapprehension of the act. As already shown, to locate a railroad is one thing, and to make provision for its location is quite a different thing. The city council, by the City act, has power to make provision for the location, but, as already suggested, the city has not the power to locate. That power is in the railroad company, subject to such provisions for the location as the city council may make. Again, the power to provide for the location of railroads is conferred upon the city council, but the duty of exercising that power in all cases is not imposed by law upon the city council. The law leaves to the discretion of the city council the question as to the cases in which the power shall be exercised, and the question as to what provision shall be made upon the subject in each case. Over this discretion the courts have no control.

It is next insisted, that this ordinance is void for want of a previous petition of the persons owning property fronting on so much of the street as was proposed to be used in the construction of this road. An examination of the ordinance will show that permission is granted to cross only the streets that intervene between the properties of the railroad company. No authority is granted in the ordinance to use any part of any street lying in front of the property of any other person. The consent to cross streets is limited by the terms of the ordinance to those parts of the streets intervening between property acquired by the railroad company for railroad purposes. Neither of the complainants alleges that he owns property fronting on the proposed crossing of any street on the line. The application of the railroad company to the city council for the passage of this ordinance seems to us to be, in substance, a petition by the owner of all the frontage, and is substantially a compliance with the terms of the statute in that regard, even if we assume that that provision has relation to the mere crossing of streets. The City act provides, "the city council shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city, . . . except upon petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes." In one sense, to permit a railroad company to lay down its track across a street, is undoubtedly granting "the use of" part of the street for railroad purposes, and is also granting "the right to lay down the railroad track in a

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street;" but in the connection in which these words are used in the 90th clause of the 62d section of the act in relation to cities and villages, it is plain that they have no reference to the mere crossing of streets by a railroad track. In that section the words as to "the use of the street," and as to the laying down of railroad tracks "in the street," plainly have reference to the use of so great an amount of the street that the frontage upon the part used would have usually several owners; for the provision is, that such a grant shall not be made "except upon the petition of owners representing one-half of the frontage, or so much thereof as is sought to be used, for railroad purposes."

The General Assembly does not use the same language here as that used in the Railroad act. In that act it is said, no railroad shall be constructed "upon or across any street" without, etc. In the prohibition against granting the use of streets without a petition, etc., the thing designated is spoken of as "the use of" the street, or the right of laying a railroad track "in any street." The words "in any street" in the city charter, plainly mean the same as the "upon" any street, in the Railroad act. In the Railroad act it was thought necessary, in order to include the crossing of a street, to add the word "across" to the word "upon." The word "across" is not found in the phrase in question in the City act, in addition to the word "in," and this is because that clause has no reasonable application to the mere crossing of a street. Obviously, this clause has reference only to cases where the city may propose to grant the privilege to a railroad company to run along a street for a given distance. This clause has really no application to a case such as is presented in this record.

Again, it is insisted that the provision in the 7th section of this ordinance, that the permission granted in the ordinance is upon the condition that said railroad company "shall permit any other railroad company, not exceeding two in number, which have not at present any right of entrance into the city of Chicago under any existing ordinance, to use the said main railroad track herein authorized to be laid, jointly with the said Chicago and Western Indiana R. R. Co.," is a delegation of the power of the city council, and operates to divest the city council of some of its chartered powers, and for that reason the ordinance is invalid. This position is not tenable. A railroad company having its track lawfully in operation to and into the city of Chicago, has a right, by law, to lease the use of its track to any other railroad company, or to make running arrangements by which any other railroad company may run its cars upon the tracks of the railroad company owning the same; and the city council has no power to prohibit a railroad company having a track established and in use in a city, from permitting other railroad companies to run their cars upon the same. This provision, therefore, does not confer upon the railroad com-

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pany any power whatever, nor does it deprive the city of any power whatever. Obviously, it is a burden imposed by the ordinance upon the railroad company, requiring that it shall furnish additional railroad facilities to the city of Chicago by consenting to make arrangements with such other railroad companies as are described in the ordinance for the joint use of their tracks.

This ordinance is characterized by counsel as one that is likely, if effective, to bring great injury upon the city of Chicago, and to produce evil to the public. That is not a question for the determination of this court. We find nothing on the face of the ordinance rendering it vicious, nor is it alleged in the bill that any injury to the public is to result from its passage.

We find no sufficient ground to question the validity of this ordinance.

The decree of the Superior Court must be reversed and the bill dismissed.

Decree reversed.

WALKER and SCHOLFIELD, JJ.—We are unable to concur with the majority of the court in the decision of this case.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

DICKEY, J.—Counsel for appellee have fallen into some very grave errors in the preparation of their petition for a rehearing.

It is first insisted that there is no express authority conferred by statute upon this railroad company to locate its road. This is a mistake. Such a corporation is expressly required to define in its articles of association "the places from and to which it is intended to construct the proposed railway;" (clause 2d, sec. 3, ch. 114, Rev. Stat. 1874,) and is expressly "authorized to proceed to carry into effect the objects set forth in such articles, in accordance with the provisions of this [that] act." (Sec. 3, same chapter.) By section 18 such corporation is expressly authorized to acquire title to any real estate required for right of way, by purchase or in any manner provided by any law of eminent domain; and by section 20 the power is expressly conferred upon such corporation "to cause such survey for its proposed railway to be made as may be necessary for the selection of the most advantageous route," and "to lay out its road," and "to construct the same." These provisions do not use the word "locate," but the words used mean the same thing. It is very plain that if the route be selected and laid out, and the road constructed thereon, the railroad will surely be located. "Qui hæret in litera hæret in cortice."

Again, counsel say, in their petition, that "the provision of the act of 1849, prohibiting railroads from entering cities without the municipal consent, is still in full force and effect, unrepealed and

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unmodified." This is clearly an error. Whatever may be thought of the proviso in the act of 1872 saving "all general laws, . . . so far as the same are not inconsistent" with the provisions of that act, that question is put at rest by the act of March 31, 1874, wherein that act of 1849 is wholly repealed, without any saving clause affecting the case at bar. (See Rev. Stat. 1874, chap. 131, sec. 1, clause 135, pp. 1012–1017.) This statute must have escaped the attention of counsel.

Again, counsel seem to have totally misapprehended the views of the court expressed in the opinion heretofore filed, upon another subject. They say in their petition, "the argument of the opinion is, that the railroad company, and the railroad company alone, has power to locate its route, whether within or without cities, and . . . that this power given to city councils to provide for the location of the track is a power simply to consent to what it can by no means either prohibit or interfere with." In other parts of the petition the idea presented is, that this court has, in substance, said that the power conferred upon the city council by the City act does not authorize such council to determine what the location within the city of a new railroad shall be, if at all. And again it is suggested, that this court has in this case decided that the statute gives to the city council only "a right to grant to the railroad company permission to do what the company, under the law, has power to do despite of the council." No such thought is expressed in the opinion, and none such can reasonably be implied from any expression it contains. On the contrary, it is therein expressly declared that the power of location conferred by the Railroad act upon the railroad company must be exercised by it, "subject to such provision as the city council may lawfully make." And again, in speaking of the freedom with which the railroad company may act in selecting and locating its route, the same is qualified by the words, "until some provision limiting the same is made by the city council." And again, the opinion says, "the railroad company derives its power to locate its road from the act of the legislature," (the Railroad act) "subject to such restraints as the city council may lawfully exercise under the provisions of the act in relation to cities." There is not one word in the opinion expressive of the idea that city councils have no power to control the location of railroad tracks within cities, and it is difficult to conceive how counsel of ability and intelligence could allow themselves to assume that the opinion so teaches. When counsel think fit to characterize unfavorably a given view of the law, they should not attribute such a view to the court, unless clearly justified by the language used in stating the grounds of decision. Before assuming and insisting that the court has announced a palpably untenable proposition, it is certainly not unreasonable to expect of them a careful perusal of the whole of an opinion.

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Some criticism is indulged in as to the use of the term "locate." We said: "The city council has no power to locate a railroad. . . . The power of the council is to provide for the location of the railroad by the railroad company, for by law no one other than the railroad company has the power of location," etc. It is obvious from the context (upon the most casual reading) that the word "locate" is here used in its primary sense,—meaning, to put in place. The council may direct what the location must be, if at all, but it is for the railroad company, in such case, to make the location or put the track in the place designated. If the railroad company do not choose to so locate their track, it is no function of the city to locate or put the track in place. This surely could mislead no one.

We find no ground for further consideration in this case. The application for rehearing is therefore denied.

Rehearing denied.

See Chicago, etc., R. R. Co. v. Dunbar, 1 Am. and Eng. R. R. Cas. 214. See note, p. 280.

LAURA EICHELS

v.

THE EVANSVILLE STREET RY. CO.

(*Advance Case, Indiana. January* 24, 1882.)

The charter of a city may be extended by a general statute.

The charter of a city gave it no authority to grant permission to a company to put down a street railway in its streets. A general statute of the State gave to all the cities power to grant such permission.

Held, that such city derived power from such general statute to grant permission to a company to lay its tracks in the street.

Where the abutting lot owners own the fee in the street, subject to the public uses, the laying of a street railway, when the cars are propelled by horses, is not an additional burden on the easement.

FROM the Vanderburg Circuit Court.

ELLIOT, C. J.—The questions which this record presents are thus stated by the appellants' counsel:

1. Can a municipal corporation, by ordinance, authorize street railway companies to encumber its streets by laying and maintaining railroad tracks therein without express authority therefor by the legislature?

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2. Has the corporation appellee obtained the necessary legislative sanction to authorize the laying down and maintenance of its track in the streets of the city of Evansville?

3. Can a street railway company, even with the proper legislative sanction, lay down and maintain its track in Second Street, in the city of Evansville, without applying and tendering damages to the abutting owners whose lots extend to the centre of the street, and upon which said track is laid?

In an able argument, signally forcible and clear, counsel for the appellants maintain that these questions require a negative answer.

We concur, in the main, with the appellants upon the answer to the first question. In asserting that the grant of authority to lay tracks upon the public streets of a city must be expressly conferred, the counsel limit the rule more rigidly than the authorities warrant. Such an authority must, it is true, be conferred by statute, but it is not indispensably essential that the grant should be stated in express words. If it is conferred by necessary implication it will be upheld and enforced.

But the grant must be conferred either by express words or be necessarily implied. Without such a grant the public streets cannot be used by a railway corporation for the transportation of passengers for hire. The right to so use the streets is a franchise, and such a franchise as can only exist by force of legislative grant. The power to grant franchises is a high legislative trust, and it is a grave question whether the legislature can delegate it to municipal orporations. People's R. R. *v.* Memphis, 10 Wall. 32. We are not, however, called upon to decide whether the legislature can delegate this power, but we are required to decide whether such a power is embraced within the ordinary and incidental powers usually conferred upon, or possessed by, municipal corporations.

The city of Evansville was organized and is acting under a special charter granted prior to the adoption of the constitution of 1852, and possesses the ordinary rights and powers of a municipal corporation. There is no provision in the original charter, nor in any of the various acts, directly amending, conferring power to grant to either steam or horse railway companies the right to use the streets of the city. The ordinary and incidental powers of a municipal corporation are not broad enough to include the powers to grant to a railway company the right to lay tracks, and conduct the business of transporting passengers upon and over the streets of the municipality. Such a power is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporations. We are speaking now, not of the intersection and crossing of streets by railway tracks laid down in build-

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ing lines of road which run through the city, but of railways exclusively doing business in the city, and occupying the streets for that purpose.

The charter of a municipal corporation may be awarded or repealed at the pleasure of the legislature. Sloan *v.* The State, 8 Blkf. 361; The City of Indianapolis *v.* The Indianapolis Home, 50 Ind. 215; Lucas *v.* The Board, etc., 44 Ind. 424; 1 Dill. Munic. Corp. § 64. The power of the legislature to alter or amend the charter of Evansville cannot be, and, as we understand counsel, is not doubted. The question presented is not whether the legislature can alter or amend, but whether they have done so.

On the 4th day of June, 1861, an act was passed by the General Assembly, entitled "An act to provide for the incorporation of street railroad companies," containing, among others, these provisions: "Sec. 1. Be it enacted by the General Assembly of the State of Indiana, that any number of persons not less than five, being subscribers to the stock of any contemplated for the purpose of constructing, ironing, and maintaining street or horse railroads, switches, or side tracks upon or through the streets of the cities or towns within the state, by complying with the following requirements.

Sec. 5. "Such company may construct their tracks, switches, side tracks, or turn-outs upon the streets of said cities, upon the following conditions and restrictions."

The contention of the appellants is that this is a general law and cannot apply to a city organized under a special charter, for the reason that such a charter cannot be changed or altered except by a law directly amending or repealing the special charter. The question then which confronts us is this: Can the special charter of a municipal corporation be altered or amended by a general law?

Appellants refer us to the case Longworth *v.* The Common Council of Evansville, 32 Ind. 322. Conceding that the doctrine of that case is sound, it cannot affect the question here in hand. That case decides that a special charter may be amended by a special law. But that is not the question under discussion. We are not considering whether special legislation is valid in such cases, but whether an act general in its terms and with language broad enough to apply to all the cities of the State, howsoever incorporated, applies to and governs cities organized under special charter. Reference is also made to The State *v.* Brannin, 23 N.J.L. (3 Zabr.) 484. This case does decide that special charters to municipal corporations cannot be destroyed by subsequent general enactments. We are unable to ascertain the ground upon which the court rested its decision, for there is neither argument nor authority adduced in support of the ruling. The proposition is, in our

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opinion, too broadly stated. If the legislature can alter or amend at will, it must rest with them to determine the manner in which the amendment shall be made. If they have the power to enact both general and special laws, they are the exclusive judges of which is the proper method. It is for the courts to determine not which is the proper method, in cases where either may be adopted, but what is the purpose and effect of the statute adopted. We think the true rule is that stated by Judge Dillon, who says: "It is a principle of very extensive operation that statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities, but they do so when this appears to have been the purpose of the legislature. If both the general and special acts can stand they will be construed accordingly. If one must give way it depends upon the supposed intention of the law makers, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactment." 2 Dill. Munic. Corp. § 87. It is upon this general doctrine that the case of Bayard *v.* Evansville, 39 Ind. 450 proceeds. It was held in that case that the act of 1867 relative to the assessment of shares of bank stock superseded the provision upon that subject, in the special charter of the City of Evansville. We are clear that the legislature may, by general legislation, alter or amend the special charters of municipal corporations.

There is much more reason to doubt the power of the legislature to amend special charters by special amendatory acts, than there is for doubting their power to change or repeal them by general legislature. Our Constitution favors general legislature, and certainly as to the creation of new corporations forbids all special laws save only in the cases expressly named as exceptions. There are many very well considered cases holding that, under such a Consti tution as ours, special charters cannot be amended. But this question is not presented, and we do not decide it; we do not decide, however, that the special charter of a municipal corporation may be amended by special legislature, when the intention is to apply the acts to cities organized under special charters, as well as those incorporated under general laws, that intention well given, and the act will be deemed the law not only of one class of cities, but of all.

The language of the act of 1861 embraces all of the cities of the State. If there were any ambiguity in the language of the act we should be bound to give it this effect; for it is very evident that the intention was that all cities of the state might, if the governing officers should so desire, receive the benefit of the law. In any other way than by a general law could any city, no matter how in-

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corporated, obtain street railways? for it is very certain that under our Constitution such corporations as street railways can only be created by general legislature.

We come now to the third and last question. It is the settled law of this State that the public takes only an easement in the streets of a city, and that if a steam railroad company lays its tracks upon the streets, the owner of the fee is entitled to damages. The Terre Haute Co. *v.* Scott, 14 Ind. 29. It is contended that this principle applies to home railroads. The very decided weight of authority is against appellants upon this point. The question has received very full and very able consideration from courts and text enters, and the difference between steam and horse railroads has been very clearly established.

Appellants have cited only one case which sustains their contention, and in our search we have been able to find no other.

The decision in Craig *v.* Rochester, 38 N.Y. 404, was that of a divided court, three of its members dissenting from the prevailing opinion. The decision of the same court in other cases contains doctrines which it is impossible to reconcile with that which prevailed in the cases relied upon by the appellants. This is especially true of the Davis *v.* The Mayor,15 N. Y. 530; and People *v.* Ken, 27 N. Y. 188. The doctrine of the principal case under mention has not found favor outside of New York. The text enters declare a different doctrine. Judge Dillon says: "The author regards the appropriation of a street for a horse railway, constructed and used in the ordinary mode, to be such a use as falls within the purpose for which the streets are dedicated or acquired, under the power of eminent domain. When authorized or regulated by the public authorities, this is a public use within the fair scope of the intention of the proprietor when he dedicates the street or is paid for the property to be used as a street.

Such proprietor must be taken to contemplate all improved and more convenient modes of use. There is solid ground to distinguish between horse railways in streets as ordinarily laid and used which do not exclude the public, and common railways which are generally so constructed to exclude a portion of the street from public use in the accustomed modes. 2 Dill. Maine *v.* Caps. 3d ed. 122. Judge Casley recognizes the distinction between horse railroads and ordinary steam railroads, and expresses the opinion that the laying down only a frequent necessity which must be supposed to have been contemplated, but it is almost as much a matter of course as grading and paving. The appropriation of a country highway for the purposes of a railway, on the other hand, is neither usual nor often important; and it cannot with any justice be regarded as within the contemplation of the parties when the highway is first established. And if this is so, it is clear that the owner cannot be

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considered as compensated for a new use at the time of the original appropriation.

Covley, Court Lim., 3d ed, 556.

The doctrine of the eminent jurists from whose works we have quoted is fully sustained by the adjudged cases. Elliott *v.* Fair Haven R. R., 32 Conn. 579; Buchanan *v.* Patterson & Co., 17 N. J. Eq 75; Jersey City *v.* Bergen Co. 20 Dud.; 61st Street Ry. *v.* Carmansville, 14 Ohio St. 523; Hobert *v.* Milwaukee, 27 Wis., 194; S. C., 9 Am. R. 461; Attorney Brown *v.* Duselenis, 14 S. A., Am. 842 Saranack, of a steam railroad track does add a new binder entitling the owner of the fee to compensation, but that laying and operating a horse railroad does not. We quote his language.

Perhaps the true distinction in these cases relates not to the motive power to the railway, or to the questions whether the fee simple or a mere easement was taken in the original appropriation, but depends upon the question constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated for a town street it is unquestionably appropriated for all ordinary purposes for a town street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track, and the preparations for this use is not co. city. Peddicord *v.* Balt. Co., 34 Md. 479; General *v.* Metropolitan & Co., 125 Mass., 45, 515, Ga. 602.

On the recent case of Hess *v.* Baltimore & Co., 52 Md., 242 S. C. 36 Am. 371, express and full approval is given to the doctrine maintained by Judge Dillon and by Judge Covley. The Supreme Court of Iowa has very recently given this general subject a thorough consideration in the case of Stanley *v.* The City, 54 Iowa, 453, and it was there held that a municipal corporation had no authority to grant a right to a street railway to use steam as the motive power, but it was conceded that ordinary horse railways might be operated upon the streets without imposing an additional binder upon the owner of the fee.

The question has been so fully discussed in the cases and text books to which we have referred that nothing of importance or of interest can be added.

The rule sustained both by principle and authority is, that a horse railway may be placed and operated upon the streets of a municipal corporation without increasing the binder of the sentence, and that the owner of the fee is not entitled to compensation because of such use of the streets upon which his property abuts.

Judgment affirmed.

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It is a general rule that the more specific provision controls the general one; or, "a thing given in particular shall not be taken away by general words." In the particular case there was no provision relating to street railways, and the proposition before the court was whether the general statute law, applicable to all cities incorporated under a general law of the State, was so injected into the special charter of the city of Evansville as to authorize the laying of street railways in her streets. In the charter nothing was "given in particular," while the general statute law gave such power in general. We will cite a few cases illustrating the foregoing principle, cited from Devo's Stat. 2d, 513, and Bish. Stat. Criner, sec. 126.

The county board of Philadelphia county, by the act of 1834, was established with power to hold personal property, but with no power to subscribe for railroad purposes. In 1852 a general act was passed authorizing any county through which a railroad should pass to donate so much money for its extension through the county or take stock therein. The act of 1834 required the consent of the Senate and House of Representatives before the commissioner of the county could levy any tax. The act of 1852 declared it to be competent for the corporate and constitutional authorities of any municipal or other corporation to subscribe for stock, and to borrow money to pay therefor. It was argued that the county was a municipal or other corporation, and that the county commissioners of Philadelphia county were the constituted authorities of the county. It was held that this general law did not repeal the law particularly appertaining to the county of Philadelphia, and that it was not authorized to levy a tax for the purpose of taking stock without the consent of the Senate and House. Brown *v.* County Commissioners, 9 Harris, 37. The General Assembly of Georgia in 1809, by statute, prohibited the corporation of Savannah from debarring any citizen of the State from selling at wholesale in that market. In 1849 an act was passed vesting the Mayor and Aldermen with power to pass an ordinance, as should appear to them necessary for the security, welfare and convenience of the city, or for preserving the health, peace and good government of the same, with the usual repealing clause. The city passed an ordinance in 1851 forbidding any one buying fish in the market in quantity greater than was requisite for the use and consumption of his family. It was held that the act of 1809 was not repealed by the act of 1849; that a later statute, which is general, does not repeal a former one that is particular; that a by-law which infuses a particular statute, relating to a corporation, is void; and that the General Assembly cannot confer upon a corporation the power, by ordinance, to repeal a statute of the State. Haywood *v.* Mayor, etc., 12 Geo. 404.

By an act of the General Assembly of Alabama, January 12th, 1856, the Governor of the State was authorized to loan the funds of the State to aid the Mobile and Ohio R. R. Co.; and that the time of payment, upon certain contingencies, might be extended. By an act of February 14, 1856, if any railroad company failed to pay at the time it became due any loan made by the State to it would forfeit its charter. It was held that the latter statute did not repeal the former, and on failure to pay its loan the time of payment

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of the loan to the Mobile and Ohio R. R. Co. could be extended. Mobile and Ohio R. R. Co. v. State, 29 Ala. 573.

By an act of February 20, 1865, the Missouri and Mississippi R. R. Co. were authorized to receive, and it was declared lawful from them to devote, subscriptions from any county to the capital stock thereof. The legislature were expressly prohibited from repealing or annulling the charter, but no direct provision was made against its being altered or amended. In 1867 the county court took and subscribed $175,000 in the stock of the said company without a vote of the county. July 4, 1865, the present constitution took effect, which provides that "all statute laws of the State now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or be repealed by the General Assembly." Also, "the General Assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company," without a two-thirds vote of the qualified voters in favor thereof. It was held that the special charter of the Missouri and Mississippi R. R. Co. was not repealed by the constitutional provision, and that such company could receive a subscription without a vote of the qualified voters having been taken. State ex rel. M. and M. R. R. Co. v. Macon County, 41 Mo. 453.

By a special act of February 8, 1843, the city of St. Louis was prohibited from at any time becoming a subscriber for any stock in any corporation. By special act of March 1, 1851 (the act of 1843 then being in force) the city was authorized to subscribe to the stock of the Ohio and Mississippi R. R. Co. The act of 1843 was amended March 3, 1851, enacting that "the city shall not at any time become a subscriber for any stock in any corporation;" and that "all acts and parts of acts contrary and inconsistent with the provisions of this act, or within the purview thereof, etc., are hereby repealed." It was held that the act of March 3, 1851, did not repeal the act of March 1, 1851, and that a subscription under the act of March 1, 1851, to said company was valid. City and County of St. Louis v. Alexander, 23 Mo. 483.

By a special act the Bank of Arkansas was authorized to contract for a greater rate of interest than six per cent without the contract being in writing. By a subsequent general law all contracts for a greater rate of interest than six per cent unless in writing were declared to be void It was held that the latter act did not take away the provision of the special act, and that a contract with a bank for a greater rate of interest than six per cent, although not in writing, was valid. McFarland v. Bank of the State, 4 Ark. 410. So a special statute giving a bank a summary process for collection is not affected by a subsequent general law, unless such intention is clearly manifest on the face of the act. Pearce v. Bank of Mobile, 33 Ala. 698.

So where an act passed in 1862 provided that at a certain time after the war was over a vote might be had by the people of Calhoun county on the matter of removing their county seat. An act of 1863 provided, if it became necessary or desirable to remove a county seat, and a majority of the board of supervisors deemed it so, and it was approved by three fifths of the voters, it might be done. Where the vote under the act of 1862 was not taken until

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1866, it was held that the operative part of the act of 1862 was repealed by the act of 1863. Conley v. Calhoun County, 2 W. Va. 416.

But where a special act authorized certain municipal corporations to subscribe stock in a railroad, and to issue bonds in payment thereof, it was held that a subsequent general law relating to municipal corporations containing a clause repealing "all laws" then "in force for the organization or government" of municipal corporations, did not repeal such special prior enactments. State v. Perrysburg, 14 Ohio St. 472.

And in England, where an act of parliament had authorized individuals to enclose and embank portions of the soil under the River Thames, and had declared that such land should be "free from all taxes and assessments whatever," the land tax, subsequently passed, by general words, embraced all the land in the kingdom; and the question came before the King's bench whether the land mentioned in the special act had been legally taxed under the general land tax; and it was held that the tax was illegal. Williams v. Pritchard, 4 D. and E. 2. For an interesting discussion of this subject see the opinion of Judge Thurman in Cass v. Dillon, 2 Ohio St. 607; Assessors of Philadelphia v. Commissioners, 3 Brewster (Pa.), 333.

For interesting cases relating to charters of municipalities and the repeal of their provision by subsequent general statutes see Commissioners of Central Park, in re, 50 N. Y. 493; Mayor v. Inmon, 57 Geo. 370; Louisville v. McKeon, 18 B. Mon. 9; Hammond v. Haines, 25 Md. 541; Bond v. Heistand, 20 La. Ann. 139; Ottawa v. County, 12 Ill. 339; Egypt Street, 2 Grant, 455; Walworth County v. Whitewater, 17 Wis. 193; Kellogg v. Oskork, 14 Wis. 623; Jonesville v. Morkol, 18 Wis. 368. See also State v. Branin, 3 Zabr. 484, where it was held that a general railroad tax law by implication repealed prior special charter power of municipalities. See also State v. Sevarance, 55 Mo. 378. So provisions in a city charter, inconsistent with amendments to the constitution afterwards adopted are void. Public School Trustees v. Taylor, 30 N. Y. Eq. 618.

So general legislation on a particular subject must, in the absence of anything showing a different intent on the part of the legislature, give way to inconsistent special legislation on the same subject. State v. Morristown, 33 N. J. L. 57; Cross v. Morristown, 18 N. J. Eq. 305; Goddard, in re, 16 Pick. 504; State v. Jersey City, 5 Dutch, 170; State v. Clark, 1 Dutch, 54; State v. Trenton, 7 Vroom, 198.

So where the legislature annexed to a general statute a repealing clause, abrogating all inconsistent local or special enactments upon the same subject, it was held that such local or special acts were repealed thereby. Bank v. Bridges, 1 Vroom, 112; State v. Miller, 1 Vroom, 368. See also Bank v. Davis, 1 McCon. Ch. (N. J.) 286; Clintonville v. Keeting, 4 Denio, 341; Tierney v. Dodge, 10 Minn. 166.

An interesting case upon the subject of repealing the provision of a charter of a city by the general law in that of United States, ex rel. Learned v. Mayor and Council of the City of Burlington, 2 Ames Law Reg. 394. The city of Burlington was authorized to levy a tax not to exceed one eighth of

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one per cent for the purpose of defraying the current expenses, and for any or all the purposes not to exceed one per cent. The common council, in pursuance of the power given in the city's charter, issued bonds upon which a judgment had been rendered in favor of the relator. The relator applied to the court for a mandamus to compel the proper city officials to levy a tax to pay his judgment, to which they returned that they had previously levied a tax to the full extent of the law, viz., one per cent. An enactment of the general code of the State provided, "And if the debtor corporation issues no scrip or evidence of debt a tax must be levied as early as possible." The city issued no scrip. It was contended that the provision of the code repealed the provision of an earlier date, but the court held that it did not, and that the return was good. But this decision was practically overruled in Butz v. City of Muscatine, 8 Wall. 575. See Clark v. Davenport, 14 Iowa, 494, which follows Learned v. Burlington.

Interesting questions arise upon taxation by municipalities and the effect of general statutes upon special charter thereof.

Thus in Virginia, the general laws imposing taxes for the support of the State government required railroad companies to pay into the State Treasury for every passenger transported by them, one mill for every mile of transportation, and then provided that "every company paying such shall not be assessed with any tax on its lands, buildings, or equipments." It was held that the general tax law was intended to refer only to State taxation, and did not extend to cities and towns; that the proviso in the city of Alexander did not limit the power of the city to tax such property or subjects as are taxed by the State; and that under the above mentioned power in its charter, such city could tax the real estate and personal property of the company permanently located therein; and the opinion was expressed, as the residence or domicile of the company was in the city, its rolling stock, employed on the road of the company, was not exempt from city taxes levied thereon. Railroad Company v. Alexander, 17 Gratt. 176.

Authority conferred upon a village corporation to assess taxes "upon the freeholders and inhabitants of said village according to law," means according to the provision and general principles of the general tax law in force at the time the assessment is made. Per. Nelson, J.: "There are numerous bodies in this State, like the village in question, which possess to a limited extent the power of local taxation, and, I presume, in every instance the principles and modes of imposing a tax are ascertained by reference to the general tax law; and we should lament to be obliged to give to their several powers such a construction as would prevent a participation in the improvements of the system of taxation which are made from time to time and to be found only in the general tax law on the subject." *

"When the general law is made applicable [to municipalities] in this way [that is by words of reference to the general laws contained in their charters], any change in the general law would produce a corresponding change in the

* Ontario Bank v. Bunnell, 10 Wend. 186.

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method of taxation by municipal corporation, the reference being to the law as it shall exist for the time being. American, etc., v. Buffalo, 20 N. Y. 381. See also the same effect, Buffalo v. Le Couteulx, 15 N. Y. 451; State Bank v. Madison, 3 Ind. 43; Gardner v. State, 1 Zabr. 557; Mayor v. Mutual Bank, 20 N. Y. 387; Davenport v. Railroad Co., 16 Iowa, 348; Bridge Company v. Dubuque, 32 Iowa, 427; State v. Town Council, 8 Rich (S. C.), 214.

Where a city is authorized "to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the State," such tax must be levied upon the same persons and property as prescribed by the revenue laws of the State. The phrase, "tax-payers of the city, taxable under the revenue laws of the State," designates both the person and subject of taxation. Bannett v. Henderson, 4 Bush. (Ky), 255.

So authority in the duties of a city to "assess all taxable real and personal property within the city" refers to the general State law to ascertain what kind of property is subject to taxation, and the corporation has power to assess not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute. Buffalo v. Le Couteulx, 15 N. Y. 451; Davenport v. Railroad Co., 16 Iowa, 348. The same principle is involved in Tackoberry v. Keokuk, 32 Iowa, 155, and in Lot v. Ross, 38 Ala. 156.

But in South Carolina, in cases arising under the charter of the city of Charleston, which is authorized "to assess those who hold taxable property within the same," the words taxable property are construed "to mean all property not exempt by law from taxation," whether the State taxes the particular kind of property or not for State purposes. State v. City Council, 10 Rich. Law, 240; City Council v. Speers' Law, 719; Id. 623; City Council v. St. Philips Church, 1 McMul., Eq. 139; State v. City Council, 4 Strob. L. 217; State v. City Council, 5 Rich. L. 561; State v. City Council, 1 Mill Ch. 40; City Council v. Condy, 4 Rich. L., 254.

In some instances municipal charters have been held to authorize the corporations to tax in a different mode, or upon different principles, from that adopted by the legislature in respect to State taxation. Adams v. Mayor, 2 Head (Term), 368; Mayor v. Bailey, 1 Humph. 232; Shoalwater v. Armstrong, 9 Humph. 217; Gless v. White, 5 Sneed, 475.

For instance, where the general law upon the subject of taxation was held not to apply to city taxation. See Langdon v. Fire Department, 17 Wend. 284; Furman v. Knapp, 19 Johns. 248; Municipality v. Railroad Company, 10 Rob. La. 187; Municipality v. Bank, 5 Rob. La. 151; Sanden v. McLin. 1 Ired. 572.

It is a very well established rule that neither a municipal council nor the legislature can authorize a railroad company which propels its cars by steam to occupy the streets with its track, where the fee of the street is in th adjoining lot owners. The cases upon this subject are very well collected in the note to the case of the Terre Haute and Indianapolis Railroad Company v. Scott et al., 3 Am. and Eng. R. R. Co. 208 S. C.; 74 Ind. 29. Such rail-

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roads are an additional burden upon the fee, and entitle the abutting lot owner to compensation for such use.

In an early New York case it is intimated, that a horse railway is an additional burden upon the easement for which the abutting lot owners are entitled to damages for the occupation of the street. Wager v. Troy Union R. R. Co., 25 N. Y. 532. In a subsequent case the point was directly decided in favor of the adjoining lot owners. Craig v. Rochester City and Brighton R. R. Co., 39 Barb. 449 S. C.; 39 N. Y. 449. On the contrary the directly opposite view has been taken in Connecticut. Elliot v. Railroad Company, 32 Conn. 579. See also Imlay v. Railroad Company, 26 Conn. 249.

The New York cases above cited are not in conflict, we think, with People v. Kerr, 37 Barb. 357 S. C.; 27 N. Y. 188; Kettinger v. Street Railroad Company, 50 N. Y. 206, because in those cases the abutting lot owner did not own the fee of the street, but it was in the public. In the latter case the railway company laid its track, having the rightful permission so to lay it in the street, so near the sidewalk in front of the complainant's lot as not to leave sufficient space for a vehicle to stand, thus incommoding him and lessening the value of his premises, and it was held that he had no cause of action; because he with the public had free access to pass and repass and also free access to his premises, and a mere inconvenience did not entitle him to a cause of action. See also Brooklyn Central, etc., R. R. Co. v. Brooklyn, 33 Barb. 422.

So in Wisconsin it was held that the owner of the fee of a public street is not entitled to compensation for the construction and operation of a horse railroad therein, in the absence of proof of special damages; and that the owner of a store will be prevented by such railroad from unloading drays and wagons in front thereof, will not constitute such special damages. Hobart v. Milwaukee City R. R. Co., 27 Wis. 194; S. C., G. Ames, 461. To the same effect is Peddicord v. Baltimore, etc., R. R. Co., 34 Md. 463.

In Ohio a middle ground is taken between the New York and Connecticut decision, to the effect that authority to lay down the necessary structure for a street railway in a common highway or street, and to run cars thereon for the carriage of passengers for hire, may be lawfully granted to a company incorporated for that purpose, without any compensation to the owner of adjoining lots, except where some private rights of such owners are thereby impaired; that there exists in the owners of adjoining lots a private right to have free access to their lands and buildings from the street, as the same was and would have continued to be according to the mode of its original use and appropriation by the public, and that there can be no change of such method and adaptation of the street to new vehicles and methods of carriage and transportation which shall materially impair or destroy such right, unless by consent of the owner upon the payment of due compensation to them. Street Ry. Co. v. Cumminsville, 14 Ohio St. 523; see Crawford v. Delaware, 7 Ohio St., 459; Sargeant v. O. and M. R. R. Co., 1 Handy, 52. The English rule is that the occupation of a highway by a railroad is the imposition of an additional burden. Ramsden v. The Manchester, etc., Ry. Co., 1 Ex. ch. 723. And in Missouri, even a plank road was held to be such an additional burden. Williams v. Natural Bridge Plank Road Co. 21 Mo. 580.

Possibly the same doctrine is held in Louisiana. Brown v. Duplessis, 14 La. Ann. 842.

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In Massachusetts it was held that a Board of Aldermen had full power to locate horse railway tracks and regulate the running of cars thereon. A license to such railway corporation to reasonably use a highway is not such appropriation of an additional easement as will entitle abutters to compensation; and it violates no constitutional right in that regard. Attorney-General v. Metropolitan R. R. Co., 125 Mass. 515.

The Court of Appeals of Kentucky in passing upon this point says: "A street railway track is part of the street. Individuals may drive ordinary vehicles upon it at pleasure, provided they do not unreasonably interfere with the passing of cars on the track. The track prevents only slight impediments to the ordinary use of the street, and does not commonly require any change in the grade, and in States in which the construction of steam railroads through streets is held to be a new servitude, for which abutters are entitled to compensation as for land taken for public use, it is almost uniformly held that no such right exists because of the occupation of streets by street railways. The reason is, as we have before said, that the operation of street railways is a legitimate use of streets, and an exercise of the public right to travel upon them." Covington Street R. R. Co. v. Covington and Cincinnati Ry. Co., 19 Ames' La. Reg. 765 (1880).

The same view has been taken in New Jersey. "The cars are drawn by animals such as usually draw the vehicles used on public highways. They carry along the highway such passengers as otherwise would be obliged to pass over it on foot, or in other vehicles, and do so with no more injury in the way of noise, jar, or disturbance than would be occasioned by the passage of other vehicles. The use, if it be novel and peculiar in its form, is but a modification of the original use to which the highway was devoted when it became a highway; the burden thereby imposed upon the land owner, so far as the use of his property is concerned, is identical in kind and no greater in degree than was originally imposed on the land when the highway was opened. Citizens' Coach Co. v. Camden Horse R. R. Co., 33 N. J. Eq. 267; S. C., 1 Am. and Eng. R. R. Cas. 190. This use also held, where the legislature required the rails to be placed the same width apart that the wheels of wagons and carriages are, established by law that there was an implied permission on the part of the company to use the track by other vehicles to some extent, and that such permission does not emanate from the company so as to be revocable by it. But see Cottam v. Guest; 6 Q. B. L. R. 70; S. C., 1 Am. and Eng. R. R. Cas. 574. For an opinion of the Chancellor in the same New Jersey case cited, see 4 Stew. Eq. 525. The Chancellor's decree was affirmed. In Hinchman v. Paterson Horse R. R. Co., 2 C. E. Green (N. J.), 75, the same view was taken as that in 33 N. J. Eq. 267. This view was mentioned with approval in State v. Laverack, 5 Vroom, 201; also in Jersey City and Bergen R. R. Co. v. Jersey City and Hoboken R. R. Co., 5 C. E. Green, 61; and followed in Paterson and Passaic R. R. Co. v. Paterson, 9 C. E. Green, 158.

Rails laid down by a horse railroad corporation in a public street are the private property of the corporation, so that a rival corporation cannot use them on the ground that they, as part of the public, have the right to travel and run cars anywhere on such street. City R. R. Co. v. City R. R. Co., 20 N. J. Eq. 61; Brooklyn R. R. Co., v. Brooklyn Co. 32 Barb. 358; Denver, etc., R. R. Co. v. Denver City Ry. Co., 2 Col. 673. See also, as to the competing rights of two companies on the same street, Omnibus R. R. Co. v. Baldwin, 1 Am. and Eng. R. R. Cas. 316.

Street railways have an easement in the street on which their track is laid; it is private property, subject to taxation, and may be taxed as real property, or assessed for local benefits. Street Ry. Co.'s Appeal, 32 Cal. 499. A passenger car, or a street railway, is entitled, as against common vehicles, to

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preference in the use of its rails, and to an unobstructed road. Wilbrand v. Eighth Avenue R. R. Co., 3 Bosw. 314; Commonwealth v. Temple, 14 Gray, 76; State v. Foley, 31 Iowa, 527; Hegan v. Eighth Avenue R. R. Co., 15 N. Y. 380.

They may also exclude from their tracks the cars of other horse railroad companies, though given authority to use such tracks by the legislature, unless compensation is required to be made. Jersey City and Bergen R. R. Co. v. Jersey City and Hoboken R. R. Co., 5 C. E. Green (N. J.) 66; S. C., 6 C. E. Green, 550; Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Metropolitan R. R. Co. v. Quincy R. R. Co., 12 Allen, 262.

So where a vehicle meets a car the vehicle must give way. Shea v. Buena Vista R. R. Co., 44 Cal. 414. But it has been held that a wagoner has the right to use its tracks, so as not to unnecessarily interfere with the right of passage of its cars. Adolph v. Central, etc., R. R. Co., 65 N. Y. 554.

So where a street railway company was authorized to lay down its track in the streets of a city, subject to such restriction as the city council might impose, constructed its track under the direction of the city engineers, but in such a manner in crossing a gutter as to cause surface water to overflow and injure one of the adjoining proprietors, it was held that the company was liable for the damages occasioned by the improper construction of its track. Horse R. R. Co. v. Deitz, 50 Ill. 210. So where a company, when it obtained permission of the city to lay down its track, covenanted with the city to keep the street in repair, and it did not, and injury resulted from such neglect, it was held that the company was liable. Brooklyn v. City R. R. Co., 47 N. Y. 475; S. C., 7 Amer. Rep. 469. See People v. Fort street, etc., Ry. Co., 41 Mich. 413.

Although the question is decided with but little argument in the principal code, as to the power of either to grant leave to street railway corporations to occupy their streets, yet there are many limitations upon such power, as will be seen by a citation of a few cases. Thus in New York, the charter gave the City Corporation general power to open, alter and regulate the streets. By virtue of their power, and without any express authority, mediately or immediately, from the legislature, the corporation of the city undertook, by resolution, to confer upon a company the exclusive right to control and maintain for a term of years a railway in Broadway for the transportation of passengers for profit. This resolution was held void. Davis v. Mayor, etc., 14 N. Y. 506. The case is decided upon the principle that the powers of a corporation in respect to the control of the streets are held in trust for the public benefit, and cannot be surrendered or delegated by contract to private persons. Upon this point see People's Railroad v. Memphis Railroad, 10 Wall. 38, on page 52. This use has been approved and followed in many others. Milhau v. Sharp, 27 N. Y.; 611 S. C.; 15 Barb. 528; Coleman v. R. R. Co., 38 N. Y. 201; Louisville City Ry. Co. v. Jonesville, 8 Bush. 415; Covington, etc., R. R. Co. v. Covington, 9 Bush. 127.

So in Illinois, under the constitution of that State, it was held that the legislature could not grant the right to construct and operate a street railroad within any city, town, or incorporated village, except by requiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroads. And it was further held that the same ruling applied to horse railways. The clause of the constitution referred to was that "no laws shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the streets or highways proposed to be occupied by such street railroad." Metropolitan City Ry. Co. v. Chicago, 96 Ill.; 620 S. C.; 2 Am. and Eng. R. R. Cas. 291.

It is doubtless the law in the United States that legislative authority or

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sanction is necessary to enable the town or others to occupy the streets or highways, or for the town to grant leave to a company for the purpose of a horse or street railway. Boston v. Richardson, 13 Allen, 146; Denver, etc., Ry. Co. v. Denver City Ry. Co., 2 Colo. 673; City R. R. Co. v. Memphis, 4 Caldw. 406. Such is the law in Great Britain. Galbreath v. Armour, 4 Bell App. 374; Regina v. Train, 9 Cox Cr. Cas., 180; Queen v. Charlesworth, 16 Q. B. 10; Queen v. Gos. Co., 2 El. and El. 651.

In the charter of a street railway company, it was authorized to use the streets of a city upon obtaining the consent of the council, and by a supplement it was authorized to construct several tracks specified, no reference being made to any consent of the council; and it was decided that, as to such tracks, the consent of the council was unnecessary. Jersey City v. R. R. Co., 20 N. J. Eq. 360.

For decision upon the rapid transit by elevated railroads through cities, see N. Y. Elevated R. R. Co., in re, 70 N. Y. 327; Gilbert Elevated Ry. Co., in re 70 N. Y. 361.

The charter of New Orleans gave to the city power "to regulate and improve streets," and to regulate carts, etc., "of every description thereon;" a State law in relation to public improvements declared that "no railroad, plankroad, or canal should be constructed through the streets of any incorporated city or town without the consent of the municipal council thereof." It was held competent for the city to grant the right of way in the streets to private individuals, for a specified term, for the purpose of laying down rails and running horse cars over them. Brown v. Duplessis, 14 La. Ann. 842. This case holds that the abutting lot owners are entitled to no additional compensation by reason of an additional or greater burden being imposed upon the streets, and the reasoning of the court is certainly excellent.

But where a statute relating to the construction of street railroads required city councils to obtain "the consent of a majority in interest of the owners of the property upon the street being first had and obtained" before a street railway could be constructed in the street, it was held such consent was essential to the power of the city to grant such permission; and that the action of the city council giving permission did not conclude the property owner on the question whether the requisite majority had assented; and that a second or additional track was in the nature of a new enterprise, and required an independent consent of the property owners interested, and that those who had assented a year ago to a single track could not be counted; and it was further held that the act of the legislature forbidding city councils from permitting the streets to be used for a street railway without consent of the property owners thereon, recognized in them such an interest as entitled them to an injunction against the construction of the road where the council granted permission, without the requisite consent of the proprietors interested being obtained. Roberts v. Easton, 19 Ohio St. 78. For another case of second track see R. R. Co. v. Reed, 41 Cal. 256.

And where a street railroad company, without authority of law, laid down a track upon a certain street, and subsequently another company obtained a legal franchise to lay down a track upon the same street, it was held that the second company had a right to remove the track of the first company. Omnibus R. R. Co. v. Baldwin, 1 Am. and Eng. R. R. Cas. 316.

Even direct authority from the legislature to a street passenger railway company to occupy the streets of a city does not exempt it from municipal control. Frankford Passenger Ry. Co. v. Philadelphia, 58 Pa. St. 119; State v. Herod, 29 Ia. 123; City Ry. Co. v. Louisville, 4 Bush. 478.

But a city has no power to authorize a "steam motor" to be used to propel horse cars upon the public streets, the fee whereof was in the municipality in trust for the public, unless specially authorized by statute. Stanley v. Davenport, 52 Iowa.

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The Chicago and Western Indiana R. R. Co.

v.

Earnst C. Prussing et al.

(96 *Illinois Reports*, 202. *September* 25, 1880.)

A railroad company seeking the condemnation of a part of a lot for the purposes of the road, has no cause to complain of an order of court fixing the compensation to be paid, and directing the money to be paid to the treasurer of the county for the benefit of the owners of the property affected, or those interested in it. Such an order does not determine who is entitled to the compensation awarded.

Appeal from the County Court of Cook county.

Messrs. G. & W. Garnett, for the appellant.

Messrs. Butz, Eschenburg & Prussing, for the appellee Prussing.

Dickey, C. J.—In September, 1870, the railroad company filed its petition in the county court of Cook county for the condemnation of the south half of lot 8, in block 1, in Taylor & Creigh's subdivision of the east half of the north-west quarter, section 4, town 38 north, range 14, east of the third principal meridian.

It is alleged in the petition that Ernst Prussing, the city of Chicago, and the county of Cook, are persons who own, or claim to have an interest in said property, and it is asked that the amount of compensation and damage to be paid for the appropriation of said property for railroad purposes shall be ascertained by the court.

Subsequently the petition, by leave of the court, was so amended as to ask for the appropriation merely of the east 50 feet in width of the south half of the said lot 8. Issues were formed under this petition. Prussing appeared to be the owner of the property, and the city of Chicago claimed to have a lien upon it for taxes, etc. Proofs were taken and the cause heard, and the court found that the value of the property proposed to be taken was five hundred dollars ($500), and that the taking of such property for such purposes would damage the residue of the south half of said lot 8 to the extent of one thousand dollars ($1000), and ordered that the petitioner might enter into possession of the property, with the improvements thereon, upon the payment of the above mentioned sum of money to the county treasurer of Cook county, Illinois, for the benefit of the owners or those interested in said property named in said petition, and ordered that the costs be paid by the petitioners. The petitioner brings the record to this court by appeal, and asks for a reversal of that judgment.

It is insisted in argument by counsel for appellant that, upon a fair consideration of the testimony in the case, the value of the

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property to be taken, and the damages to the property not taken, as found by the county court, were excessive. The evidence upon this subject is very conflicting, and after a careful examination of it, we are not prepared to say, that the court erred in that regard.

It is next said that the court ought not to have entered such a decree, upon the evidence, because Prussing, who claimed title to the property, did not prove to the court that he was the owner of the property.

There seems practically to be no room for debate about the ownership of the property. The petitioner, in the original petition, said defendant owned the property, or claimed to own or to have an interest in the entire south half of lot 8. Prussing produced a deed upon the trial, purporting to convey the property to him. He showed that he had been paying taxes on it for many years, but whether this proved title sufficient to warrant the payment of the money to Prussing, seems immaterial when we examine the character of the order. The order is that the money be paid to the treasurer of Cook county, for the benefit of the owners or those interested in it. There is really no decree here that Prussing owns the property. The only matter in judgment is, that the property was needed for the corporate purposes of the railroad, and that the amount fixed by the court would be a reasonable compensation to be paid to the owners for the use of the property in the manner proposed.

We find nothing in the decree of which the appellant can justly complain.

The judgment must be affirmed.

See Redman v. Phila., etc., R. R. Co. and note, 1 Am. and Eng. R. R. Cas. 1.

WILLIAMS

v.

THE WESTERN UNION RY. CO.

(50 *Wisconsin Reports*, 71. *April* 3—*September* 21, 1880.)

A "right of way," in its legal and generally accepted meaning in reference to a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase.

Defendant procured to be condemned, for the use of its railroad, a strip of land through the south half of a certain block, 58, 4½ rods wide, of which two rods in width were west of the centre of its track. Afterwards it obtained a deed, from one F., of "a strip of land six rods in width, for the uses and purposes of said railroad company, along the line of their road as at present [then] located [through the south half of said block], and also all the land in the south half of said block situated west of the route of said road." Afterwards it deeded to one E. "all of that portion of block 58 which lies west of and beyond the western boundary

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of the right of way of said company's railroad as the same is located and established." *Held*,

(1) That the eastern line of the land granted to E. is a line two rods west of the centre of defendant's track, i. e., the west boundary of the land condemned for its use.

(2) That there is an incurable uncertainty in the description of the strip six rods wide conveyed to defendant by F.

APPEAL from the Circuit Court for Racine County.

Ejectment, for a strip of land about a rod wide in block 58 in the school-section addition to the city of Racine. Said strip lies parallel to defendant's railway through that block, its nearest boundary line being two rods distant from the centre line of defendant's track.

The evidence introduced by the parties is sufficiently stated in the opinion. The court submitted it to the jury to determine, from all the evidence, whether the defendant company, prior to the date of its deed to one Engerud under which plaintiff claims, had acquired a right of way three rods in width west of its track; and instructed them that if so the defendant was entitled to their verdict. There was a verdict for the plaintiff; a new trial as for errors assigned was refused; and the defendant appealed from a judgment on the verdict.

The cause was submitted for the appellant on the brief of Henry T. Fuller:

The report of the commissioners in the condemnation proceedings should have been excluded. Such commissioners had no power to adjudicate upon the extent of the company's right of way, and their report was not competent evidence of the boundaries thereof. Ford *v.* Ry. Co., 14 Wis. 609; Pettibone *v.* Ry. Co., id. 443; Brown v. Ry. Co., 5 Gray, 35. Even if such report and the judgment thereon were conclusive of the extent of the right of way at that time, they did not bar the company from subsequently adding thereto by the purchase of further lands. And the evidence shows that this was in fact done—that the premises in question were purchased of Fratt and became a part of the right of way of defendant's road, before the conveyance to Engerud. This evidence was admissible to fix the boundaries of the right of way at the time of the deed to Engerud, they not being determined by that instrument. Dart on Vend. & Pur. 452; Mason *v.* White, 11 Barb. 173; Stone *v.* Clark, 1 Met. 378; Allen *v.* Kingsbury, 16 Pick. 239; 2 Hill. on R. P. 346; Helmholz *v.* Everingham, 24 Wis. 266. And it shows that the right of way then included the premises in dispute, and that the plaintiff had notice of such fact by the record of the deed from Fratt. The existence of a fence within the defendant's right of way at or since the time of the conveyance to Engerud does not estop the company from claiming beyond such fence to the real boundary of its right of way. Warner *v.* Fountain, 28 Wis. 405. The premises were not included in the deed to En-

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gerud, and the plaintiff acquired no title thereto by occupation adverse to the defendant, such adverse possession having continued for less than twenty years. McEvoy *v.* Loyd, 31 Wis. 142; Stevens *v.* Brooks, 24 id. 326; Warner *v.* Fountain, 28 id. 405; Crary *v.* Goodman, 22 N. Y. 170. It was error to submit to the jury for construction the written instruments and records introduced in evidence. This was matter of law for the court. 2 Hill. on R. P. 363; note a; Becton *v.* Chestnut, 4 Dev. & B. 335; Frier *v.* Jackson, 8 Johns. 496, 515; Mason *v.* White, 11 Barb. 186; Allen *v.* Ins. Co. 5 Gray, 384; Ranney *v.* Higby, 5 Wis. 62; Rogers *v.* Bradford, 1 Pin. 418; Helmholz *v.* Everingham, 24 Wis. 266; Farnsworth *v.* Brunquest, 36 id. 202.

John T. Fish for the respondent.

The deed to Engerud must be construed favorably for the grantee. It conveys the land west of the west boundary of the right of way of grantor's railroad "as the same is located and established." The records show no other location or establishment of such right of way than that by the commissioners, fixing the western boundary line thereof two rods from the centre of the track. The deed from Fratt does not attempt to locate or establish the boundaries of the right of way. At the time of the conveyance to Engerud, the company had built a fence two rods west of its track, and was occupying as right of way only up to that line. That line must therefore be held to be that intended by the parties to such conveyance. In this view of the case it is immaterial that the court left to the jury the construction of the deeds and the decision of questions of law.

The following opinion was filed April 20, 1880:

ORTON, J.—The defendant company, in 1854, procured a right of way through the south half of block 58, in the school-section addition to the village, now city, of Racine, by the condemnation, according to law, of a strip of land along the then located track of their road, four and one half rods in width, two rods of which were west of the centre of said track. In 1855 the company obtained, by deed of one Fratt, "a strip of land six rods in width, for the uses and purposes of said railroad company, along the line of their road as at present [then] located [through the south half of said block]; and also all the land in the south half of said block, situated west of the route of said road." In 1857 the company deeded to one Engerud "all of that portion of block 58 which lies west of and beyond the western boundary of the right of way of said company's railroad, as the same is located and established." In 1869 Engerud deeded to the plaintiff "the south half of all that part of said block which lies west of the western boundary line of the Western Union R. R. Co.'s right of way.

The company claims a strip of land one rod in width, west of the western boundary line of their original right of way, through

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the south half of said block, by virtue of the grant of the six-rod strip of land in the Fratt deed of 1855, and took possession of the same; and the plaintiff claims and seeks to recover said strip by virtue of the company's deed to Engerud of 1857. The report of the commissioners in the condemnation proceedings of 1854, and its confirmation by the circuit court, and all of the above deeds, were introduced in evidence. There was much other evidence given, on behalf of both parties, in respect to the former use, possession and fencing of this rod strip; and certain resolutions of the board of directors of the company, and certain maps and plats of the company and of the city of Racine, showing the right of way of the company through the south half of block 58, were also introduced in evidence.

We think that this evidence was clearly incompetent as affecting the construction of any of the above deeds, or the location and boundary of any of the parcels of land conveyed. It is at least questionable, in a case where title is not claimed by an adverse possession of twenty years, whether the company would be estopped by enclosing only a part of their right of way, and tacitly allowing the possession and use of the residue by others for a considerable length of time. Warner *v.* Fountain, 28 Wis. 412. And certainly any such evidence could not affect the construction of deeds or the title conveyed by them. The resolutions of the board of directors of the company, before the right of way was obtained, and the maps and plats of the company or of the city, made afterwards, could not affect in any respect the right of way of the company over the lands of others, or their title to lands acquired by purchase; for the first must depend solely upon the proceedings of condemnation in 1854, and the latter upon the Fratt deed of 1855.

This evidence was not only incompetent, but it was well calculated to confuse the case and cause the error complained of, of submitting the whole issue to the jury upon all the evidence, both record and parol, which involved the construction of the deeds, which was the exclusive province of the court. Farnsworth *v.* Brunquest, 36 Wis. 202. But as the verdict was general, and, as we think, correct, and this error, if one, has not prejudiced the appellant, it will be disregarded, and especially where both parties were in fault in conceding the competency of such evidence, which involved questions of fact proper to be submitted to a jury rather than to be determined by the court.

The construction of the deed of the company to Engerud is not difficult or doubtful. The western boundary line of the right of way obtained in 1854 is fixed and certain.

"Right of way," in its strict meaning, is "the right of passage over another man's ground;" and in its legal and generally accepted meaning, in reference to a railway, it is a mere easement in the lands of others, obtained by lawful condemnation to public use or

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by purchase. (Mills on Em. Dom. § 110.) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way. The authorities cited by the learned counsel of the appellant to show that the location and boundaries of the right of way are not determined by the commissioners who are appointed to assess the damages and compensation by reason of its having been taken, do not meet the point here. The appointment of commissioners on the petition of the company to assess such damages and compensation, and their report of such assessment and its confirmation, are proceedings for the lawful condemnation of lands already taken, located, and designated, and described in the petition; and such proceedings, together with the payment or proper security of the assessment, constitutes the only evidence of the right of the company to the lands so taken, and not only the best but really the only evidence of the company's title. The report being the evidence of the exact western boundary line of the company's right of way, it is not difficult to determine the east line of "all that portion of block 58 which lies west of and beyond the western boundary of the right of way of said company's railroad, as the same is located and established."

From this description the boundary is an absolute certainty, and there is no room for construction. The title which the company obtained to the six-rod strip by the Fratt deed, in 1855, is not title to a right of way, but title in fee simple; and, as we have said, it cannot properly be called a right of way. But if admitted to be a right of way, where is its location and what are its boundaries? To change or destroy the absolute certainty of the above description in the commissioner's report, and in the deed of the company to Engerud, these should be equally as certain.

The opposing counsel in this case differ very widely as to the location and boundaries of this six-rod strip. The learned counsel of the appellant contends that its western boundary is one rod west of the original right of way, which would make the strip three rods east and west of the centre of the railroad track. This would cover the land already obtained by the proceedings of condemnation.

The learned counsel of the respondent contends that all of this six-rod strip must lie east of the railroad track, because in the same deed the company obtains title to all of the lands in the south half of said block west of the original right of way by the language, "also all the land situated west of the route of said road." Why may not a theory different from that of either counsel be correct? viz: that the six-rod strip so conveyed is in excess of the original right of way, and lying on both sides of it, or three rods east and three rods west of it. This would be a construction strongly against the grantor, and the only difficulty with it is, that it divides the

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strip and makes two strips instead of one. It is impossible to ascertain the location and boundaries of the six-rod strip by anything in the deed, or by reference to anything else. There is an inexplicable and incurable uncertainty in the description of this strip of land amounting to a patent ambiguity. On the other hand, there is a certainty of description of the other land granted by the same deed in the language, "and also all the land in the south half of said block west of the route of said road," if the six-rod strip is thrown out of the question. If the company, by this construction of the deeds, is deprived of an additional one rod in width of land west of its original right of way, that was not intended to be conveyed to Engerud, it is attributable to an inexcusable blunder in conveyancing.

By the Court.—The judgment of the circuit court is affirmed, with costs.

A motion for a rehearing was denied September 21, 1880.

The Atchison & Denver Ry. Co.

v.

Alfred Lyon.

(24 *Kansas Reports*, 745. *January Term*, 1881.)

In a proceeding upon appeal to recover damages for the right of way appropriated to the use of a railroad company, the owner of the land filed a petition setting forth his claim, but made therein no reference to the construction of any crossings or bridges, and no sufficient evidence was offered showing any necessity for the land-owner to build a bridge for a farm-crossing. *Held*, That a finding of $85 for a bridge, as an element of damage, not sustainable.

In assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams being frightened, or that additional care by the land-owner may be necessary in the future as to such teams, by reason of the proximity of the railroad, does not of itself constitute any basis for special compensation. Such damages are speculative, and not the proper subject of inquiry and damage.

Error from Mitchell District Court.

The nature of the action, and the facts, appear in the opinion. At the December Term, 1879, of the district court, Lyon had judgment against the Ry. Co., which brings the case to this court.

Horace Cooper, Clark A. Smith, and D. Martin, for plaintiff in error.

Levi Cooper, for defendant in error.

Horton, C. J.—The plaintiff in error laid off and condemned a right of way for its railroad over and across the northeast fractional

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quarter of section 30, township 6, range 10, containing 114 $\frac{89}{100}$ acres, in Mitchell county. The report of the right of way, filed by the commissioners in the office of the county clerk of that county, June 6, 1879, showed the condemnation of a strip 100 feet in width, the entire line thereof entering the east side of said tract, at a point 1,410 feet south of the northeast corner, and leaving the west side at a point 1,722 feet south of the northwest corner thereof, its course being on a tangent or straight line 2,378 feet in length, and occupying 5 $\frac{47}{100}$ acres of land in the quarter-section. The commissioners awarded, as the value of the land taken and the damages to the entire tract, the sum of $225. The defendant in error, claiming to be the owner of the land, filed his bond for appeal to the district court of said county. Thereafter, he filed a petition in the conrt, in which he set forth his claim for damages in the language following, to wit:

"That the appraisement of value and assessment of damages to said land of said plaintiff, as shown by the report so filed as aforesaid, is grossly inadequate and wholly insufficient to compensate him for the value of the land so taken, and the damages he has sustained thereby; that the land of said plaintiff so taken, is of the value of five hundred dollars; and the plaintiff further says, that by reason of the appropriation of such right of way, said tract of land has been divided into two separate tracts of land, and divided in such a manner that it has been rendered less valuable for farming, stock raising, and other purposes, and otherwise damaged by the construction of said railway, to the injury and damage of said plaintiff's lands, in the sum of five hundred dollars, making the total damages to said plaintiff the sum of one thousand dollars."

On November 1, 1879, the plaintiff in error filed an answer admitting its incorporation and the condemnation of the railroad route across the tract of land, and denying each and every other allegation contained in the petition. At the trial of the cause at the December Term, the jury returned answers to special questions submitted to them, and also a general verdict in favor of the defendant in error for $312. The special questions submitted, and the answers of the jury thereto, are as follows:

"Q. 1. What was the actual market value of the 5 $\frac{47}{100}$ acres of land taken for the right of way, without reference to any question of damages to the remainder of the farm? A. $66.

"Q. 2. In addition to the value of the land taken, what was the amount of the real and actual damages to the remainder of the farm by reason of the taking of the 5 $\frac{47}{100}$ acres by the defendant for a right of way for its railroad? A. $246.

"Q. 3. How much was the damage to that part of the farm north of the right of way? A. Nothing.

"Q. 4. How much was the damage to that part of the farm south of the right of way? A. $108.

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"Q. 5. What are the several elements or sources of damages which make up the aggregate of the answer to special question 2, and how much of said aggregate is made up by each of said elements or sources of damage? A. Bridge, $85; extra care of stock, $53; right of way, $66; damages on the land, $108; aggregate, $312. L. A. NELSON, Foreman."

Motions were made by plaintiff in error to deduct the following sums from the general verdict, viz.: $85, $53, and $66. These several motions were overruled, and judgment rendered in accordance with the verdict.

Objection is made to the character of the evidence touching the valuation of the land before and after the location of the railroad upon it, and also as to the instructions of the court thereon. We think this objection is substantially met in K. C. Ry. Co. *v.* Allen, ante, p. 33.

The other objections of counsel are more tenable. The two items, "bridge, $85," and "extra care of stock, $53," ought to have been deducted from the verdict, as these items were improperly included as elements of damages, in the aggregate of $312. There was no claim in the petition for the value of any bridge, and the evidence did not warrant the finding. In assessing damages to land appropriated for the right of way through it for a railroad, the jury may always take into consideration all incidental loss, inconvenience and damages, present and prospective, which may be known, or may reasonably be expected to result from the construction and operation of the road in a legal and proper manner, but as the proceeding by appeal is in the nature of a revision of the award of damages made by the railway commissioners, the verdict is not to be based upon the supposition that the road is to be illegally operated or improperly maintained. (M. K. & T. Ry. Co. *v.* Haines, 10 Kas. 432–442; Mills on Eminent Domain, §§ 213–215.) The item of $53 for extra care of stock, seems to have been allowed under the following direction of the court: "Though upon the matter of scaring teams, I will say, that the fact of the liability of teams being scared, and the additional care necessary to be used in using such teams by the plaintiff upon the land in question, is an element of damages you can take into consideration." This direction to the jury permitted speculative damages for which no compensation is properly recoverable, and therefore the damages returned cannot be sustained. It is not every conceivable annoyance and inconvenience resulting from proximity to, and intersection by, a railroad, that is the proper subject of inquiry and damage. Of course, acts which at times are legal and necessary, may be done without necessity—out of mere heedlessness and negligence, or with a wanton and criminal intent to do wrong—and thereby a railroad company may incur a liability to the person injured, whether he be the owner

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of the land or not. (A. & N. R. R. Co. *v.* Garside, 10 Kas. 552; Culp *v.* A. & N. R. R. Co., 17 Kas. 475; Isom *v.* Miss. C. R. R. Co., 36 Miss. 300; Presbrey *v.* Old Colony & Newport Ry. Co., 103 Mass. 1; Mills, supra, § 193.)

Counsel for defendant in error concedes in his argument the inconsistency of the answers to the special questions with the general verdict, but claims the general verdict should stand upon the ground that it is supported by the evidence, and that the jury were misled by the questions submitted and gave incorrect responses. This might be an argument against jury trials in general, and the incapacity of the jury in this particular case, but it is no valid reason for a disregard of the command of § 287 of the code, nor ought we to indulge in the presumption that the jury were too ignorant to comprehend their duty. When the special findings of fact are inconsistent with the general verdict, the former control the latter and the court must give judgment accordingly. The case will be remanded with direction to the district court to enter judgment for $174, and adjudge the costs of the appeal against defendant in error. (Comp. Laws 1879, p. 231, § 86; p. 721, § 128.) The costs in this court will be divided.

All the Justices concurring.

See as to crossing and remedy Vermont, etc., R. R. Co. *v.* Franklin, 10 Cush. 12; East Pennsylvania, etc., R. R. Co. *v.* Hiester, 40 Pa. St. 53; Horne *v.* Atlantic, etc., R. R. Co., 36 N. H. 440; Brainard *v.* Connecticut, etc., R. R. Co., 7 Cush. 506; Lyon *v.* Green Bay, etc., R. R. Co., 42 Wis. 538; Wademan *v.* Albany, etc., R. R. Co., 51 N. Y. 568. As to additional care of stock, liability of teams being frightened, Culp *v.* Atchison, etc., R. R. Co., 17 Kan. 475; Atchison, etc., R. R. Co. *v.* Garside, 10 Kan. 552; Presbrey *v.* Old Colony, etc., R. R. Co., 103 Mass. 1; Proprietors *v.* Nashua, etc., R. R. Co., 10 Cush. 385; Isom *v.* Mississippi, etc., R. R. Co., 36 Miss. 300; Bordentown T. Co. *v.* Camden, etc., R. R. Co., 17 N. J. 314.

SCHROEDER

v.

FIRST DIV. ST. PAUL & PACIFIC R. R. Co. and others.

(*Advance Cases, Minnesota. September* 29, 1881.)

In an action for trespass to real estate, by which permanent injury to it is done, if the property have a rental value the depreciation in the annual rental value caused by the injury may be shown, in order to show how much the value of the real estate was diminished by the trespass. The trespass consisted in constructing a railroad across a farm without the right to do so having been acquired by ascertaining and paying compensation to the owner. *Held*, that if the ties and rails increased the value of the farm, that should be considered in determining the amount

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of damages; but if the farm was no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage done to the farm should be made on account of the value of the ties and rails.

APPEAL from order of district court, county of Stearns.

Taylor & Calhoun, for respondent. Gilman & Clough, for appellant.

GILFILLAN, C. J.—Action for trespass upon real estate constituting a farm, by entering upon and constructing a railroad across it without having secured the right to do so by ascertaining and paying compensation to the owner, this plaintiff. The measure of damages recoverable in such a case is usually the difference in the value of the farm had the trespass not been committed, and its value with the injurious acts accomplished. The court below, against the defendants' objection, admitted evidence to show how much the injury done depreciated the annual rental value of the farm. That was one way of showing the actual injury—the actual diminution in the value of the farm. Where property injured has an annual rental value, proof of how much such rental value has been depreciated may, in some cases, be the most satisfactory way to show the injury to the value of the property. It is always admissible for that purpose. House *v.* Hammond, 39 Barb. 89. If, at the same time, there be other direct evidence of the depreciation in value of the property, the court can, as it did in this case, by proper instructions to the jury, guard against the danger of double damages being allowed.

The evidence established the fact that in addition to the excavations and embankments made by defendants on the land they laid the track—that is, the ties and rails—across it, and insisted that because by their being attached to the soil they became the property of plaintiff, and he might take them up and sell them, therefore their value should be deducted from the injury done to the land by the trespass. The court below declined to give to the jury defendants' request containing that proposition, and instructed, in substance, that the ties and rails had become part of the realty, and the jury, if satisfied that they increased the value of the farm, should consider that fact in determining the damages; but if they were satisfied that the farm was in no way benefited or enhanced in value by the ties and rails, then no deduction should be made on account of them.

We regard the charge of the court as conveying the proper rule applicable to the case. The proper measure of damages was the injury done to the farm—the depreciation in its value as a farm by the trespass; and there is no rule of law by which, where the amount of such injury is ascertained, the trespasser may be allowed, by way of recoupment or counter-claim, any conjectural benefit

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not accruing to the farm itself, and thus modifying the extent of the injury to it which the owner may incidentally derive from the trespass. Conceding, for the purposes of this case, that by being laid across the farm the ties and rails became the property of the plaintiff, yet they became such against his will and by the wrongful act of the defendants. To set off the value of the ties and rails, as distinct from the value of the farm, after the trespass, against the injury done him, would make him an unwilling purchaser of them; would compel him to pay for a supposed benefit forced upon him by the wrongful act of the defendants; would compel him, in order to be made good for the injury done, to remove the ties and rails, take them to market and sell them, he assuming all the risks incident thereto. The propriety of lessening the consequences to the wrong-doer of his own wrongful act, must be very apparent indeed to admit of placing the party wronged in such a position. There is certainly nothing to justify it in this case.

Order affirmed.

CITY OF MENASHA and another

v.

MILWAUKEE & NORTHERN R. R. Co., impleaded, etc.

(52 *Wisconsin Reports*, 414. *June* 4, 1881.)

1. A railroad company, organized under the provisions of section 1820, Rev. St., with power to purchase the franchises and property of an older company, previously sold under a mortgage, as well as to construct and operate other lines of road, is not, by virtue of such purchase, an assignee of the older company, so as to be bound by any of its contracts, except such as are a lien upon or otherwise bind the property and franchises thus purchased.
2. A railroad company, having power to extend its track from its depot in the plaintiff city through the city of Neenah, so as to connect with the Wisconsin Central railroad, entered into an agreement with the city, for a valuable consideration, not to make such connection. *Held*, that this (if valid) was a mere personal contract, binding only said company and such persons as may be, in a strict sense, its successors or assignees.
3. The Milwaukee & Northern R. R. Co., being authorized by legislative act to build a railroad from the city of Neenah, across Doty's island, to the line of the Milwaukee & Northern Ry. Co., in the plaintiff city, it takes authority by subdivision 6, § 1828, Rev. St., to operate such road in connection with the last-named company's road, notwithstanding any covenant of such last-named company with the plaintiff prohibiting such connection.
4. No legal obligation of the Milwaukee & Northern R. R. Co. to refrain from building and operating said road being shown, the complaint alleges that the organization of said company was fraudulent and collusively made for the purpose of enabling its co-defendant, the Milwaukee & Northern Ry. Co., to avoid its covenant, etc., and asks for an injunc-

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tion against both roads. The answer fully meets and denies all the averments of fraud and collusion. *Held*, that on the complaint and answer the injunction should have been refused, and plaintiffs left to their legal remedy.

APPEAL from circuit court, Winnebago county.

Chas. W. Felker and Eldridge Smith, for respondents. E. Mariner, for appellant.

TAYLOR, S.—This is an appeal from an injunctional order restraining the appellant from constructing a railroad from the city of Menasha, through the city of Neenah, so as to connect the appellants' railroad terminating in Menasha with the Wisconsin Central Railroad. The grounds alleged for restraining the appellant, "The Milwaukee & Northern R. R. Co.," are that the Milwaukee & Northern Ry. Co. entered into an agreement with the village, now city, of Menasha that, in consideration of the said village issuing and delivering to said railway company $60,000 of its corporate bonds in exchange for the same amount of the capital stock of said company, said company, amongst other things, agreed upon its part that it would not extend its track and connect the same within three miles of its depot in the village of Menasha with any other railway, so as to permit the passage of cars from one road to the other, otherwise than north of the north branch of the Fox river, or west of Lake Butte des Morts, without the consent of said village of Menasha. It is alleged that such agreement on the part of said company was and is a great advantage to said city of Menasha, and was so considered by the company and said city at the time the same was made; that it constituted one of the principal inducements to vote the said aid of $60,000 to said railway company, and, without such agreement on the part of the company, the people of said village would not have voted said aid.

The complaint further charges that the Milwaukee & Northern R. R. Co. is, in fact, the mere successor of the Milwaukee & Northern Ry. Co.; that it is bound by the agreements of said last-named company; that the organization of the appellant company is delusive, and only made for the fraudulent purpose of avoiding the contract made with the city of Menasha, and for the purpose of building said railroad in violation of such contract.

The answer of the appellant company, in substance, alleges that it was duly incorporated under the general laws of this State, "with the powers, among other things, of purchasing the railway property and franchises of the first division of the Milwaukee & Northern Ry., and the Menasha & Appleton Ry., and to operate the same, and to construct and maintain a railroad with one or more tracks from a convenient point in the city of Neenah to the city of Menasha to connect with the Menasha & Appleton Ry., and to construct, operate, and maintain a railway with one or more tracks, connecting with the Milwaukee & Northern Ry., to a convenient

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point on the Menomonee river, and there to connect with a railroad to be built across the State of Michigan to Lake Superior, with such branches as shall be convenient to obtain business for said railroad, by charter of the State of Wisconsin, bearing date June 5, 1880.

The answer then alleges the insolvency of the Milwaukee & Northern Ry. Co., the foreclosure of a mortgage given upon its railway, rolling stock, road-bed, and franchises, and a sale under such mortgage of the first division of said railway, including the Menasha & Appleton Ry. Co.'s road; that at such sale Guido Pfister and Ephraim Wariner, a committee of the bondholders, bid off the same for the sum of $1,500,000; that the sale was duly confirmed, and that the appellant company purchased from said Pfister and Wariner the property and franchises so purchased by them at said mortgage sale; and that afterwards said appellant resolved to construct a line of railroad from a point in the city of Neenah across Doty's island, to connect with the Menasha & Appleton Ry. and the first division of the Milwaukee & Northern Ry, so purchased by the appellant, in the city of Menasha. The construction of this line of road is the one sought to be enjoined by the respondents in this action. The answer then denies all collusion with the said Milwaukee & Northern Ry., and all knowledge on the part of its incorporators of the existence of the contract set out in the complaint with the Milwaukee & Northern Ry. Co., at the time of the organization of the appellant company; alleges that the stockholders of the Milwaukee & Northern Ry. Co. have long since abandoned their investment in that company, and have ceased to elect officers thereof; denies that it was organized to be the successor of the Milwaukee & Northern Ry. Co.; denies that it was organized and created for the sole purpose of violating the covenant of the Milwaukee & Northern Ry., set forth in the complaint, and denies that said covenant made by the said Milwaukee & Northern Ry. Co. with said village of Menasha is of any benefit whatever to said city of Menasha.

The answer also shows that ever since 1873 the Milwaukee & Northern Railway has been operated in connection with the Wisconsin Central R. R., the two roads connecting in the city of Menasha, but not running through the city of Neenah, and that the new line of road is intended to connect the same roads by running through the city of Neenah, and thereby enabling the two roads to do business in the city of Neenah as well as in the city of Menasha, and that the new line will not in any way hinder the people of Menasha from doing business over both of said railroads with the same facilities and convenience now enjoyed by them.

Upon the complaint and answer the circuit court made an order restraining the appellant from constructing a road from Neenah to the depot of the Milwaukee Northern Ry. Co. in the city of Menasha, and from such order this appeal is taken.

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We think the injunction was improvidently issued and should be dissolved. All collusion and fraud charged in the complaint being denied by the answer of the appellant, the plaintiffs' right is uncertain and doubtful, and in such case a court of equity ought not to interfere but leave the party to his legal remedies. We think it is well settled by the decisions of this court that if the appellant company was in good faith organized for the purposes set out in its answer, the fact that it purchased at foreclosure sale the property and franchises of the Milwaukee & Northern Ry. Co. for the purpose of thereafter operating the same, would not bind such new company to abide by or perform the contracts of the Milwaukee & Northern Ry. Co. See Wright *v.* M. & St. P. Ry. Co., 25 Wis. 46–53.

The contract between Menasha and the old company was a personal contract, and binds only that company and its successors and assignees, within the restricted meaning of such words, and a purchaser of the property and franchises is neither a successor nor assignee, and is in no way bound by the contracts of the old company except when such contracts are a lien upon its property or in some other way bind the property or franchise. The old company, under its charter, had the undoubted right to extend its road through the city of Neenah and connect with the Wisconsin Central R. R. in that city; but, by its contract with the city of Menasha, it bound itself not to exercise that right. Admitting that this contract is valid, and that a court of equity would interfere as between the parties to prevent a violation of the same (which is, perhaps, a question of grave doubt), it is very clear that such contract cannot bind another corporation purchasing the property and franchises of said company, when the charter of such purchaser authorizes it to build the connecting road.

If the appellant corporation were a corporation organized under the provisions of section 1788, Rev. St. 1878, as the mere assignee or owner of the powers, privileges, and franchises of the old company, it may be as such organization it would have no power to exercise any right or franchise which the old corporation would not have had the right to exercise. But the appellant corporation was not organized under that section. According to the allegations of the answer it was organized under the provisions of section 1820, Rev. St. 1878, with power to purchase the property, rights, and franchises of the old company sold under the mortgage, and also with power to construct the line of railroad in question, as well as another railroad from the end of the Milwaukee & Northern Ry. at Green Bay to the Menomonee River, there to connect with other roads to be built in the State of Michigan.

We do not think that the mere fact that the appellant company was authorized to purchase the property and franchises of the Northern Ry. Co., and to operate the road constructed by such

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company, could prevent such company from constructing and operating the other roads authorized to be constructed and operated by it, although such construction and operation would indirectly avoid the covenant made by the Northern Ry. Co. with the respondents. The General Statutes, § 1828, subd. 6, authorizes every railroad to connect with every other railroad which it intersects, and provides for compelling such connections when refused. It is clear, therefore, that a corporation authorized to build a railroad from the city of Neenah across Doty's island to the line of the Milwaukee & Northern Railway, in the city of Menasha, would be authorized to build and operate the same in connection with said Milwaukee & Northern Ry. Co.'s road under said section, notwithstanding any agreement or covenant made by said last-named company prohibiting such connection. In this matter the company cannot bind the State, and those acting under its authority, although it may possibly bind itself.

We think the learned counsel for the respondents clearly recognize this power on the part of the State, and have, therefore, as the ground for their relief, alleged in various ways that the acts of the appellant were fraudulent and collusive, and that the only object of obtaining its charter was to avoid the covenant of the Milwaukee & Northern Ry. Co. in regard to the matter in controversy, and that there was no real intent to build and operate the other roads mentioned in its charter. These charges of fraud and collusion being positively denied by the appellant, there is no sufficient ground, as the case stands upon the pleadings, for granting the injunction. In the view we have taken of the case it is unnecessary to discuss the question whether a court of equity would lend its aid in enforcing a contract made by a railroad company, which prohibits it from exercising the franchise of constructing and operating all the lines of road authorized by its charter, or the other question whether it will lend its aid to enforce a contract which is in any sense against public policy, and especially in a case where the violation of the contract is a public benefit.

If, in this case, the appellant company be, in fact, the mere successor of the Milwaukee & Northern Ry. Co., and its organization is, in fact, a fraud, and made for the sole purpose of building the line of railroad in controversy, in violation of the contract made by such corporation, the right of the respondents can be vindicated in an action at law, and the public interests, which are to be promoted by the building of the line of road contemplated, will not be prejudiced. The rights of respondents are not so certain, nor are they so clearly founded on equitable principles, as to justify the court in enjoining the appellants in the construction of a work which seems to be for the public interest.

The order of the circuit court is reversed, with costs, and the cause remanded for further proceedings according to law.

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FLINT & PERE MARQUETTE RY. CO.

v.

WILLEY.

(*Advance Case, Michigan. October* 19, 1881.)

A road that has never been regularly laid out or opened by the proper authorities and which is in fact unused and is unfit for travel and closed against the public, is not a "highway" within the meaning of the provision of the railroad law which makes a company laying track across public highways liable for injuries resulting from neglect to restore them to a proper condition even though the owners of land along the road had moved their fences back so as to open it as a highway and had been paid for their lands by the township and a bridge had been built upon it by the public authorities.

ERROR to Genesee.

Wisner & Draper, for plaintiff in error. Long & Gold, for defendant in error.

MARSTON, C. J.—This action was brought by the defendant in error to recover damages for injuries sustained at the crossing of the railroad with a certain highway known as the Deming road in Genesee county; it being alleged and claimed that by reason of the neglect of the company to keep the crossing in proper condition for the passing of vehicles the plaintiff below was injured by the overturning of a load of straw upon which he was riding. Unless it was the duty of the railway company to keep the crossing in question in proper condition the plaintiff was not entitled to recover. The fifth subdivision of section 9 of Act No. 198 of the Laws of 1873, p. 505, gives to such corporations the power to construct their road upon or across any highway, but requires the corporation to restore the highway to its former state as near as may be, and to construct suitable road and street crossings for the passage of teams, by fitting down plank between and on each side of the rails of such road, the top of which shall be at least as high as the top of the rails. No claim is made that a proper crossing had not been made and kept up, but the real cause of complaint was that the company within the boundaries of its line had not properly graded the highway up to the embankment or road-bed which at this point was some three or four feet higher than the highway.

It was not claimed that the highway in question had ever been regularly laid out or opened by the proper authorities, but that some time prior to the construction of the line of railroad, the owners of the land along the line of this highway in the vicinity of the railroad track had moved back their fences, so as to open up a highway four rods wide; that the township had paid them for the land so taken, and that a bridge had been built on the line thereof by the public. It also appeared that when the corporation was

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constructed, the highway in question was not used by the public; that a part of it was only two rods wide, and that a gate or bars was kept up across the same until long after the railroad was built, and that up to this time it was not used or travelled by the public generally but as a private way by Deming and his son-in-law. The court charged the jury, if they should find from the evidence that Gage & Franklin, who owned the land, moved back their fences for the express purpose of a highway, making the highway there, and if the township afterwards paid them for the land to be used as a highway, and expended money upon it in building bridges, if this was all done previous to the railroad being built, then it would be a highway to all intents and purposes the same as though laid out and recorded.

We are of opinion that the evidence did not justify this charge as given, and that under the evidence given the jury could not find a highway. The mere fact that fences had been moved back, the lands so to be used paid for, and a bridge built, would not constitute this a highway, where it clearly appeared in connection therewith that the land was so low, wet, and marshy that it could not be used by the public and when a barrier was erected and maintained across it to prevent its general use by the public. There was here no highway for the railroad company to restore within the meaning of the statute. We need not therefore pass upon the other questions raised in the case, as the plaintiff failed to prove the case alleged in his declaration.

The judgment must be reversed with costs and a new trial ordered.

(The other justices concurred.)

THE CINCINNATI AND SPRINGFIELD RAILWAY COMPANY

v.

THE INCORPORATED VILLAGE OF CARTHAGE.

(36 *Ohio State Reports*, 631. *January Term*, 1881.)

Where a village council and a railway company agree, under the statute, as to the terms upon which the company may use the streets of the village for its road, whereby the company bound itself to grade and gravel the streets so used, in a manner "to the acceptance of the council," *Held*, that a subsequent ordinance repealing the contract ordinance, passed with intent to rescind the entire contract, being inoperative, without the assent of the company, to rescind the grant of the right of way, is also inoperative to release the company from its obligation to grade and gravel streets.

That upon the failure of such company within a reasonable time to grade and gravel the streets as per contract, a right of action accrues to the

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village without special notice, request or demand on the company to perform its contract.

It is not essential to the right to maintain such action that the city should have established, by ordinance, other than the contract ordinance the permanent grade of such streets.

Where such contract provides for the improvement of a dedicated street which had not been previously accepted by the council, such contract for its improvement constitutes an acceptance of the dedication on the part of the village.

Under the statute, the exclusive control of the streets is in the council of villages, and directions by the mayor, concerning their improvement, are wholly without authority.

The measure of damages for the breach of such contract on the part of the company, is the reasonable cost of doing or completing the work, and upon such breach, a right of action accrues for full damages, although the work has not been done or completed by the village.

ERROR to the District Court of Hamilton County.

On May 2, 1871, the incorporated village of Carthage granted to the Cincinnati and Springfield Ry. Co. the right of way through the village on Lebanon Street, by ordinance, which contained the following proviso:

"Provided, however, that the cuts and fills for said railway shall not be greater than shown in the accompanying plan or profile, and that in constructing said railway through said Lebanon Street, or across any other streets in said village, the said railway company shall be required to construct, whenever the same may be needed, suitable culverts and gutters for the passage of water, and shall cause to be made easy and convenient crossings for all streets crossing said railway, and that said Lebanon Street be so graded and graveled by said railway company as to permit the portion thereof not occupied by said tracks to be used as other streets are used, to the acceptance of the village council."

The company accepted the grant and constructed their road through said street.

The original action was brought by the village against the railway company, in the court of common pleas of Hamilton County, to recover damages for an alleged breach of the stipulations contained in the proviso.

The defendant claimed, in the first place, that said stipulations had been performed by it, and, second, that said ordinance had been repealed. Verdict and judgment were rendered for plaintiff. This judgment was affirmed by the district court.

Upon a bill of exceptions taken on the trial in the court of common pleas, several matters are alleged for error, which are sufficiently stated in the opinion.

M. C. Shoemaker and Stalls & Kittridge, for plaintiff in error:

I. As to the measure of damages in cases of this kind, see Railroad Co. *v.* City of Lawrenceburg, 37 Ind. 489; S. C., 34 Ind.

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304; Huston *v.* Railroad Co., 21 Ohio St. 235; Railroad Co. *v.* City of Fort Scott, 15 Kansas, 490.

II. The court below erred in holding that no notice or demand, which the plaintiff below alleged, was necessary to enable the village to maintain its action. We understand the rule on this subject is that whenever the fact upon which the right of action depends is within the peculiar knowledge of the plaintiff rather than of the defendant, that notice and demand must be alleged and proved. Hatch *v.* White, 22 Pick. 518; Norris *v.* Dock Co., 21 Wis. 130; Walton *v.* Walker, 3 Fos. (N. H.) 471; 2 Parsons on Con. 670, note.

Now in this case, whether public convenience or necessity required any work, and what work, to be done to enable Lebanon Street to be conveniently used, was a matter exclusively within the discretion and knowledge of the village council. The work that was provided for was to be done to their acceptance, and whether they were satisfied with it and accepted it was exclusively within their knowledge.

III. The village council are vested with exclusive discretion and control of the improvement of the streets. Nor can they contract or bargain away this discretion, or limit the exercise of it by contract. The improvement of Lebanon Street,—whether it should be improved at all or not, and how and when, was to be determined by it in the exercise of its legislative powers. 8 Beach (Ky.), 415. Now, while it could not recall the permission given to, and accepted by the railway company to lay its track in Lebanon Street, for that had become a vested right, it could reverse or repeal its action requiring Lebanon Street, outside of the railroad track, to be improved at all. State *v.* Andrews, 28 Mo. 14; Bailey *v.* Gilman, 4 Minn. 546; Mayor of Hagerstown *v.* Dechert, 32 Md. 384; Christy *v.* Supervisors of Sacramento City, 39 Cal. 3; Mills *v.* Sargent, 36 Cal. 379.

Jordan, Jordan & Williams, for defendant in error:

1. What is the measure of damages in this case? We say, what it would cost to do the work. Lawton *v.* Railroad Co., 8 Cush. 230; Walker *v.* Swayzee, 3 Abb. Pr. 136; Vivian *v.* Champion, 2 Ld. Raym. 1125; Burdet *v.* Withers, 2 Nev. & Per. 123.

2. The railroad company was not entitled to any notice or demand in regard to the work to be done. Its contract was an absolute unconditional agreement to do something, and to do it to the acceptance of the council or village.

The mayor had no control or authority over the work or the streets.

McIlvaine, J.—The ordinance of May 2, 1871, and the acceptance of the grant by the railway company, constituted a valid contract between the parties. The 12th section of the corporation

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act of May 1, 1852, as amended April 15, 1857, provided that "If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having in charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied." The contract for the right of way having been thus entered into by the parties, it was not within the power of the council of the village to rescind or modify it without the consent of the railway company. The ordinance of October 3, 1871, purporting to repeal the contract ordinance of May 2, 1871, was not intended to operate merely as a discharge of the railway company from its obligations to perform the stipulations of the contract on its part, but to rescind the contract entirely; and as it cannot have the operation intended by the council, the railway company has no right to insist that it shall have an operation not intended by the council.

It is claimed by the company, that, although the stipulated work was not performed, a right of action did not accrue to the village until refusal or neglect to do the work by the company, after special notice or demand on the part of the village. On this point it is sufficient to say, that, under the contract, the company was bound to do the work within a reasonable time. No provision was made for notice or demand. Hence, after the lapse of reasonable time, the work not being performed, a right of action accrued to the plaintiff. It is true, that this work was to be performed "to the acceptance of the village council." And as to such portions of the work as were assumed to be done, but not to the satisfaction of the council, there would be some reason for requiring notice of non-acceptance, if the work as done had been tendered for acceptance. But in the case before us formal acceptance was not solicited, and the court charged the jury on this point, that they should ascertain whether or not the village council were in fact satisfied, or ought, as a reasonable body of men, to have been satisfied with such portions of the work, and if they were, or ought to have been satisfied, then there could be no recovery on account of such portions. This statement of the law was as favorable as the defendant had a right to ask.

It is also contended that inasmuch as no grade for Lebanon street had been established by the village council, there was no means for determining the extent or nature of the work to be done by the company, or the amonnt of damages for failing to perform it. It appears to us that the non-existence of an established grade of this street did not affect the right of recovery. The grade of the railroad track had been fixed by the company, as was shown by a "plan or profile" referred to in the contract; and this grade being

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fixed, the undertaking of the company was to so grade and gravel the street as to permit it to be used as other streets were used. The street was to be improved with reference to the grade of the railroad track, so that the extent and nature of the work were sufficiently defined. We see no objection to the council making such a contract for the improvement of a street under its care and control.

The southern terminus of Lebanon street was originally at Second street, but previous to this contract one French had laid out an extension of this street southward three hundred feet and had sold lots abutting on the extension, upon which buildings had been erected. In respect to this extension the defendant below requested the court to charge the jury as follows:

"The defendant was under no obligation, by the terms of the contract set forth in the petition, to grade or gravel any part of Lebanon street, as shown on said plat of T. French, which lies south of Second street."

The court refused so to charge, but did instruct as follows:

"The ordinance set forth in the petition dated May 2d, 1871, included all of what was then known as Lebanon street, between the points for which the proposed cuts and fills were marked on the plan and profile accompanying said ordinance, which had been and then was dedicated to public use as a street, and over which said council had control as such; there is no dispute that this was the case with all of said street from the south line of Second street to Sixth street, the evidence of plaintiff to that effect not being contradicted, and being sufficient to establish the fact.

"As to the part south of Second street, being a cul de sac, extending three hundred feet from Second street, it is claimed that it was dedicated as a street by T. French, no dedication thereof having been made according to the statute in such case provided. Three things are necessary to be shown to establish its dedication. The owner must have intended to dedicate the property for a street, and to give up his private rights in it, which are inconsistent with its use as a street by the public at large. And he must have evidenced and carried out this intention by some unequivocal act, such as throwing it open to the public, fencing it out, making or recording a plat, showing it marked as a street, selling lots upon such plat, and conveying them by deeds referring to the plat. If you find that the owner so intended to dedicate it as a public street, and carried out such intentions by acts necessary for that purpose, then the village council must have accepted the dedication, there being no evidence of any acceptance by the public before plaintiff's incorporation, and I charge you that the passage of the ordinance of May 2d, 1871, accompanied by the plat or profile referred to in the ordinance, and offered in evidence therewith, recognizing the street as extending three hundred feet below

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Second street, and providing for its occupancy and improvement by defendant, is a sufficient acceptance of the dedication of that part of the street by the village council, if you find that before that time the owner on his part had done all that was necessary to its dedication as aforesaid."

We see no error in refusing to charge, or in the instruction given.

It is also alleged for error that the following testimony was rejected by the court. R. M. Shoemaker, president and superintending engineer of the defendant, was offered by defendant as a witness to prove that while the work of grading Lebanon street by the defendant was progressing under the witness's charge, that Mr. Morton, the mayor of plaintiff's corporation, instructed the witness not to grade and gravel any of the street south of Second street; that Lebanon street, as recognized by the village, did not extend south of Second street.

To which plaintiff objected, and the court sustained the objection and excluded the testimony (it not being shown, nor proposed to be shown, that said mayor had any authority from council in the premises), to which the defendant excepted.

The exclusion of this testimony was not error. The exclusive care and control of the streets of an incorporated village are placed, by statute, in the village council. And any direction in respect to the improvement of streets, assumed to be given by the mayor of the village, without authority from the council, is wholly without authority.

The last ground alleged for error against the judgment below, which we propose to consider, relates to the measure of damages. On this point the court charged as follows:

"If you find the plaintiff is entitled to a verdict, the measure of damages for such work, if any, as the defendant ought to have done and failed to do within a reasonable time, and the plaintiff did do, is the cost to plaintiff of the work done by it, and interest thereon to the first day of this term, provided such cost was the fair and reasonable cost thereof at the time when it was so done. And for such work, if any, as the defendant agreed to do and failed to do within a reasonable time, and which the plaintiff has not done, the plaintiff is entitled to recover what it would fairly have cost the plaintiff to have it done after defendant had failed for a reasonable time to do it."

The measure of damages in such cases is compensation, and, of course, corporate compensation must be limited to the corporate injury; but where the injury resulting to a corporation by the breach of a contract is the same that would have resulted to a natural person from a like breach, the rule of compensation is the same. This case is wholly unlike M. K. & T. R. R. Co. *v.* City of Fort Scott, 15 Kan. 490, where the city had granted the right of

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way through its streets in consideration that the company would build its repair-shops in Fort Scott, which the company failed to do. By the failure of the company the injury to the city in its corporate capacity was not equal to the cost of the improvements contracted for. If the shops had been built they would not have become the corporate property of the city. Nor is this case like one where the right of way is granted upon conditions, by an ordinance operating as a law merely, and the way is occupied in violation of the conditions. We need not stop to discuss the nature of penalties in such cases. Here we have a violated contract entered into by parties authorized to contract; and made, though by a municipal corporation, in relation to its corporate affairs. We cannot, therefore, see why the ordinary rule of damages should be departed from, or why the municipal corporation should be required to perform the work contracted for before instituting an action for damages for the breach of the contract. Should a tax be collected to pay for the work, and an action then brought for the purpose of reimbursing the taxpayer? Surely not. Nor does it matter at all to the delinquent contractor, whether or not the work which he contracted to do, but failed to perform, should ever be accomplished. Whether the damages realized in such action should be devoted to the improvement contracted for, or to other purposes, is a question between the village and its citizens, with which the railroad company can have no concern.

Judgment affirmed.

THE STATE OF OHIO, BY JOHN LITTLE, ATTORNEY-GENERAL, ex rel.

v.

THE DAYTON & SOUTH-EASTERN R. R. CO.

(36 *Ohio State Reports*, 436. *January Term*, 1881.),

The provision in section 16 of the corporation act of May 1, 1852, which requires a railway company to place a highway crossed or diverted, "in such condition as not to impair its former usefulness," is a condition inseparable from the right or franchise granted to such company to cross the highway with its railroad, or to divert it from its location.

While the company continues in the exercise of the franchise, the State has the right to compel it to perform the condition upon which the franchise was granted, by petition invoking the equity powers of the court, prosecuted by the attorney-general in the name of the State.

In enjoining the railway company from using the highway, where it has been diverted by the company from its location, but left in such close proximity to the railway as to make it dangerous for public travel, it is proper for the court to prescribe what change in the location shall operate to supersede the injunction.

On allowing an injunction against the company from any further work on or obstruction of the highway, the court may, on final hearing, require the

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removal of the obstructions already placed thereon, in case the company refuse to restore such highway to its former usefulness.

The remedy given to the county commissioners by the act of March 7, 1873 (70 Ohio L. 53), for the obstruction of a State or county road is cumulative, and does not affect the right of the State to maintain the present action.

ERROR to the District Court of Montgomery County.

The original action was prosecuted in the name of the State by John Little, attorney-general, on the relation of James Crosby, Patrick McGee, and Francis M. Kemp, citizens and trustees of Mad River township, Montgomery county.

The object of the petition was to enjoin the defendant from obstructing a public county road, by the construction and operation of its railroad.

It is averred, among other things, in the petition that "the defendant, not regarding the rights and interests of the public, is now engaged in constructing its road in such a manner, and at such an acute angle, that its track, if thus completed, will run some distance upon and for the entire distance thence to the turnpike, parallel with, and but a few feet from, the travelled road-bed of said public road, as laid out and used by the public for the last fifty years. At no point from said proposed first point of contact to the turnpike, a distance of over six hundred feet, is said proposed railroad track more than, say fifteen feet from the old road-bed of said public road, and generally along said distance the two are much nearer together than this. The crossing of the sixty feet in width belonging to said road, is not completed from the southerly point of entrance thereon, until said railroad enters said Springfield pike, a distance of over six hundred feet, and travellers on said railroad to or from Dayton are compelled to cross said railroad track twice, the crossing at the pike being unusually dangerous.

"The proposed crossing at the south is at an angle of only five degrees with the travelled road-bed, and parties approaching it from the south-east will be unable to see or hear approaching trains, and even when on the railroad track, at said proposed crossing, will not be able to see a locomotive approaching from the west around the base of said hill, until it will be so near as to make it impossible for such parties to protect themselves from danger.

"The plaintiff alleges that the public road aforesaid is an exceedingly convenient and valuable highway, much used by the people of the neighborhood adjacent, and the citizens of the city of Dayton, for business and pleasure. If the defendant completes and operates its road as it now proposes at said point, said road will be very greatly damaged as a public highway; its usefulness will be very greatly diminished and impaired; and the said crossing will be exceedingly dangerous and unsafe to the travelling public, both upon the road and upon said railroad.

"The damage to the public will be irreparable, and not to be

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estimated in damages, and the present structure of the defendant, as already completed and contemplated, will be a continuing public nuisance.

"Plaintiff also alleges that this damage, injury, and nuisance is not the result of a necessity laid upon defendant in the prosecution of its enterprise, and that in this it is guilty of an oppressive and unwarranted use of its authority and discretion.

"Plaintiff avers also that defendant has never taken any legal steps to appropriate or condemn a right of way over and upon said roadway; neither does it claim the right to thus interfere with, occupy, and use said roadway by virtue of any purchase or agreement.

"Wherefore plaintiff prays that defendant, by order of this court, be perpetually enjoined from any farther work within the boundaries of said public road; from completing the construction thereof as now proposed; from running or operating its road with locomotives, while said public road is in its present condition, and from any use of said common road that will impair its usefulness to the public. That, upon the final hearing of this case, defendant may be ordered to remove the obstructions it has already placed in said public road, or may hereafter place therein prior to the final disposition of this case, and that it may be required, by order of this court, to place said public road at this point in a condition which will leave it as valuable and useful to the public as it was before it was interfered with as aforesaid by said defendant.

"And plaintiff prays for such further relief as may be necessary to guard and protect the public."

To the petition there was a general demurrer, which being overruled, the case was heard upon testimony, and a decree rendered in favor of the plaintiff.

The decree, in effect, enjoined the defendant from using or occupying said public road by its railroad, and required the removal of the obstructions already placed thereon by the defendant, unless the latter, within a time prescribed, should so change the location of said county road as to make it reasonably safe for public travel. The change to be made which should operate to supersede the injunction and give the company the right to cross and occupy the road as previously located was prescribed in the decree.

On error, prosecuted by the company, the judgment or decree of the court of common pleas was reversed by the district court and the demurrer to the petition sustained.

The present petition in error is prosecuted for the reversal of the judgment of the district court, and the affirmance of that of the court of common pleas.

Thomas O. Lowe, with whom was John Little, attorney-general, and John M. Spriggs, prosecuting attorney, for plaintiff in error:

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I. The injury complained of is admitted to be a public nuisance. It is declared to be such by statute. Swan & Critchfield, 881; Id. 279, § 33; see also Moshier *v.* Railroad, 8 Barb. 427; Wood on Nuisances, §§ 250–257, inclusive. Public nuisances are to be dealt with by the State in one of two ways; either by indictment or by information in equity. The general doctrine concerning informations in equity, applicable to cases of purpresture and public nuisances, is found in the following text-books and authorities: Story's Equity Jurisprudence, §§ 920–924; 2 Johns. Ch. 381; Wood on Nuisances, § 811, et seq.; Attorney-General *v.* Hudson River R. R. Co., 1 Stockt. (N. J.) 526; Newark *v.* Elmer, 1 Stockt. (N. J.) 754; People *v.* Vanderbilt, 26 N. Y. 287; Attorney-General *v.* Cohoes, 6 Paige, 133; State *v.* Railroad, 1 Dutch. 436; People ex rel. Teschemacher *v.* Davidson, 30 Cal. 379; Hodges on Railways, 439–445; Attorney-General *v.* London & S. W. R. R., 3 De G. & Smalley, 439; Attorney-General *v.* Gt. Northern R. R., 4. Id. 75; American Law Register, April, 1877.

II. When corporations are exceeding the legitimate scope of their authority, a proper preventive remedy is a suit by the attorney-general. High on Injunctions, § 770; Putnam *v.* Valentine, 5 Ohio, 187; Walker *v.* Railroad Co., 8 Ohio, 38.

III. In all cases where the State is the proper party plaintiff, it is the law officer of the state who brings the action. This officer, at common law, is the attorney-general. Story Eq. Pl. § 49. Section 19 of the attorney-general's act of the State of Ohio (Swan & Critchfield, 90). A duty in this direction is also laid upon the prosecuting attorney. Swan & Critchfield, 1225, § 2.

IV. By the act of March 7, 1873 (70 O. L. 53) county commissioners appear to have the right to sue for damages, and obtain an order for the abatement of a nuisance in a county road. This is simply an enlargement of their legal powers, and the remedy is only concurrent with, and not exclusive of, the right of the State to restrain the creation of the nuisance. Darling *v.* Peck, 15 Ohio, 65, 71. See also 20 Ohio St. 389, citing 1 Story's Eq. § 80; Cram *v.* Green, 6 Ohio, 430. It would be a strange proposition to say that the State cannot restrain the creation of a nuisance simply because the county commissioners have been authorized to proceed to have it abated. It is no objection to an injunction like this that its form is mandatory. It amounts to the same thing as restraining from maintaining. Hodges on Railways, 620.

D. B. Corwine, for defendant in error:

This is not a case for injunction. The damage is not irreparable. Stewart *v.* R. R. Co., 14 Ohio, 358. Compensation is all the plaintiff is entitled to. 18 Ohio St. 169.

The plaintiffs are not proper parties.

1. The trustees are not authorized by law to make any such re-

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lation in reference to a county road. 5 Ohio, 186; 2 Wall. 501; 10 Ohio, 369. And see State ex rel. etc. *v.* Commissioners, etc., 5 Ohio St. 497; R. R. Co. *v.* Commissioners, etc., 1 Ohio St. 105; State ex rel. etc. *v.* Turnpike Co., 16 Ohio St. 308.

2. In all cases like the one presented in the petition, the county commissioners are alone authorized to bring suit, and the suit must be brought by and in the name of such commissioners. 70 Ohio L. 53, § 17.

WHITE, J.—The original petition in this case is in the nature of an information or bill in equity to restrain the defendant from the permanent obstruction of a public highway, to the injury of the public; and the first question arising in the case is, whether the attorney-general, in the name of the State, can maintain the action.

That courts of equity exercise jurisdiction in cases of purpresture and nuisance, of encroachments upon the public rights, as upon highways, rivers, and streets of towns, is well settled. The jurisdiction is predicated upon the broad ground of preventing irreparable injury, interminable litigation, a multiplicity of suits, and the protection of rights. Putnam *v.* Valentine, 5 Ohio, 187; Law of Nuisance by Wood, § 769, and notes.

Under the system of equity pleading, prior to the adoption of the code, the proper remedy, in cases of nuisances purely public, was by information or bill in the name of the attorney-general, or of the government, instituted by him. Law of Nuisance, supra, § 811; Story Eq. Jur. § 923; Story Eq. Pl. § 8.

That the attorney-general was authorized to institute such suits in behalf of the public is abundantly shown by the authorities. Attorney-General *v.* Johnson, Mayor, Commonalty and Citizens of London, Wilson Ch. 87; People *v.* Vanderbilt, 26 N. Y. 287; People *v.* Davidson, 30 Cal. 379; Attorney-General *v.* Stewart, 21 N. J. 340; Attorney-General *v.* Forbes, 2 Mylne & C. 123.

When the suit did not immediately concern the rights of the crown or government, its officers depended on the relation of some person, whose name was inserted in the information as the relator. A relator, however, in such cases was by no means indispensable; and the attorney-general might, if he chose, proceed in the suit without one. Story Eq. Pl. § 8.

Section 19 of the act prescribing the duties of the attorney-general, authorizes him to "prosecute any suit, information, or other suit, either at law or in equity, in behalf of the State, or in which the State may be interested." S. & C. 90. Under this provision of the statute, the attorney-general was fully authorized to maintain the action.

The petition describes the relators as citizens and trustees of Mad River Township, in the county of Montgomery; and it is claimed by counsel for the defendant, that as such trustees they have no

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authority to act as relators. This may be conceded; but they were also citizens, and as such were competent relators. Moreover, as already remarked, it was competent for the attorney-general to institute the suit without a relator.

The defendant was incorporated under the act of May 1, 1852, to provide for the creation and regulation of incorporated companies. S. & C. 271.

Section 16 of the act is as follows: "It shall be lawful for such corporation, whenever it may be necessary in the construction of such road, to cross any road or stream of water, to divert the same from its present location or bed; but said corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness."

This provision of the statute forms part of the charter of the railroad company; and though subject to alteration or repeal, yet until so altered or repealed, it has the effect of a contract between the State and the company, in fixing the rights and liabilities of the latter.

The obligation of the company to place the highway in such condition as not to impair its former usefulness to the public, is a condition inseparable from the right or franchise granted to the company to cross the highway with its railroad, or to divert it from its location for the accommodation of the railroad. R. C. Co. *v.* Commissioners of Greene Co., 31 Ohio St. 338.

While the company continues in the exercise of the franchise, we entertain no doubt of the right of the State to compel it to perform the condition upon which the franchise was granted. This may be done, as was sought in this case, by petition invoking the equity powers of the court, prosecuted by the attorney-general in the name of the State. Such was the form of remedy in Attorney-General *v.* London and South-Western Ry. Co., 3 De G. & S. 439; and in The Same *v.* Great Northern Ry. Co., 4 Id. 75.

In People *v.* C. & A. R. R. Co. 67 Ill. 118, and in People *v.* D. & C. R. R. Co., 58 N. Y. 152, the remedy was by mandamus. But no injunction was sought in these cases; and, without saying that mandamus might not have been resorted to in the present case, yet, the mode adopted was appropriate, and afforded a more flexible remedy.

The plaintiff having been found entitled to an injunction against the use of the highway by the railroad company, and the latter having diverted it from its location, but leaving it in such close proximity to the railroad as to make it dangerous for public travel, it was proper for the court to prescribe what change in the location should operate to supersede the injunction. The condition was imposed after the final hearing of the cause, on testimony, and there is nothing in the record showing that the condition prescribed was unreasonable.

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There was no error in the court after enjoining the defendant from any further work on the highway, requiring it, on failure to comply with the condition prescribed, to remove the obstructions already placed thereon by the company. The People *v.* Vanderbilt, supra, 295, 298; Corning *v.* Troy Iron and Nail Factory, 40 N. Y. 191. The plaintiff, being entitled to a perpetual injunction, it was competent for the court to administer full relief.

Counsel for the defendant relies on the act of March 7, 1873 (70 Ohio L. 53), amending the act establishing boards of county commissioners, as furnishing the only remedy in cases of the obstruction of a State or county road. That act authorizes an action to be brought to recover damages by the county commissioners.

We regard the act as merely cumulative, and not as in any way affecting the right of the State to maintain the present action. Darling *v.* Peck, 15 Ohio, 71; People *v.* Vanderbilt, 26 N. Y. 294, 295.

Judgment of the district court reversed, and that of the common pleas affirmed, with an allowance of further time to the defendant within which to comply with the order.

See Veazie *v.* Penobscot R. R. Co., 49 Me. 119; State *v.* Warren R. R. Co., 5 Dutcher, 353; Potter *v.* Bunnell, 20 Ohio St. 150; Louisville, etc., R. R. Co. *v.* State, 3 Head, 523.

THE NORTHERN CENTRAL RY. CO.

v.

COMMONWEALTH.

(90 *Pennsylvania State Reports*, 300.)

1. **An indictment will lie against a railroad company for the creation and maintenance of a public nuisance.**
2. **A turnpike is a public highway, in so far that an indictment will lie against one obstructing it, as for a public nuisance.**
3. **A railroad company may construct its railway across any established road or way wherever it may be necessary to cross or intersect it, but it must so construct it that it will not impede the passage or transportation of persons or property over said road or way. If it so construct its railway as to be a serious inconvenience and dangerous obstruction to travel along the road or way, it may be indicted therefor.**
4. **The fact that the Act of Assembly, incorporating a turnpike company gives it a specific remedy for an injury to its rights, does not impair the separate right of the Commonwealth to indict.**

MAY 16th, 1879. Before Sharswood, C.J., Mercur, Gordon, Trunkey, and Sterrett, JJ. Paxson and Woodward, JJ., absent.

Error to the Court of Quarter Sessions of Cumberland County: Of May Term 1879, No. 178.

Indictment of the Northern Central Ry. by the Commonwealth, for nuisance in obstructing a turnpike road by the construction of its railroad over said turnpike. The defendaut pleaded specially

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that the turnpike was not a public road or highway within the meaning of the act authorizing an indictment for the obstruction of travel on highways; that the railroad, as now constructed, has been in use for twenty-four years, and that an indictment would not lie as by the Act of February 24, 1806, whereby the company was incorporated, a remedy was provided against the defendant for the non-repair of the road.

The court overruled these special pleas, when the case was put at issue, and a jury returned the following special verdict:

"That the road set out in the indictment as a public highway is a portion of the Harrisburg, Carlisle and Chambersburg turnpike, built by and belonging to the Harrisburg, Carlisle and Chambersburg Turnpike Co., incorporated under the Acts of February 24, 1806, and March 9, 1814, and other supplements thereto.

"That the defendant is the Northern Central Ry. Co., incorporated, as to the portion crossing the said turnpike, by the name of 'The Susquehanna R. R. Co.,' by Act of April 14, 1851, which, with other railroads, under Act of May 3, 1854, was consolidated into the Northern Central Ry. Co.

"That the dirt, clay, stones, and embankment mentioned in the indictment as an obstruction to travel and complained of as a nuisance, make the road-bed of said railroad where it crosses said turnpike at Bridgeport.

"That the said road-bed is raised two feet on the west side and four feet on the east side above the natural line of descent of the turnpike at the point of crossing.

"If the ground did not descend naturally, the mound occasioned by the construction of the railroad at the crossing would not produce more obstruction to public travel than necessarily results from a railroad crossing, with a mound of that size and kind on a level road; but from the nature of the ground, the mound caused by the railroad crossing amounts to a serious inconvenience and a dangerous obstruction to travel.

"The elevation and level of the Northern Central Ry. at the crossing is necessary in order to cross the Cumberland Valley R. R. at grade, as now constructed, near the west end of its bridge over the Susquehanna River, the centre of the track of the Cumberland Valley R. R. Co. being but sixty-two feet from the centre of the turnpike crossing, and the charter of that company being senior to that of the Northern Central Ry. Co.

"To lower the bed of the turnpike so as to allow it to pass under the railroad, would require an expenditure of from $5000 to $8000.

"If the turnpike road made by said turnpike company is a public highway within the contemplation of the law, permitting an indictment for the obstruction of travel on highways, and if the railroad company is liable to indictment for obstructing the road in the

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manner in which they have done in the construction of their road over said turnpike, as hereinbefore set out, then we find defendant guilty in manner and form as it stands indicted; otherwise, not guilty."

Herman, P. J., delivered the following opinion:

"Two questions are presented, by the special verdict in this case, for the opinion of the court. 1. Is the Harrisburg, Carlisle and Chambersburg Turnpike road a public highway within the contemplation of the law permitting an indictment for the obstruction of travel on highways? 2. Is the Northern Central Ry. Co. liable to indictment for obstructing this turnpike road in the manner in which it has done in the construction of its railroad over it?

"1. To sustain an indictment, at common law, for nuisance in obstructing a road, the road must first be shown to be public and not private, since no indictment lies for a nuisance unless the offence be to the public generally, as distinguished from a special and limited class of persons. A public road, however, to be thus protected, need not have been formally accepted by the municipal authorities. It is enough if over it the public have a right to pass and repass, whether freely, or on payment of a fixed toll. Nor does it matter that the road is owned by a private corporation. Supposing that the public has a right, on payment of fixed toll, to travel on it, an indictment for nuisance lies for its obstruction: Whart. Crim. Law, 7th ed., sect. 2414. A turnpike road is a public highway, and an indictment will lie as for a public nuisance against any person placing obstructions thereon: Commonwealth v. Wilkinson, 16 Pick. 175. That was an indictment against Wilkinson for obstructing a turnpike road in Pawtucket, by continuing within the limits of such road certain buildings which had been previously erected thereon, and the principal question in the case was, whether a turnpike road is a highway, and whether an indictment will lie against any person, for an obstruction thereon as a public nuisance. Chief Justice Shaw, delivering the opinion of the court, said: 'We think that a turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll, levied by public authority for the purpose. Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other public highway.' This language will apply with equal force to the case now under consideration. The Harrisburg, Carlisle, and Chambersburg Turnpike road was laid out and constructed by public authority for

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public use, under a charter granted by the legislature in pursuance of a system of public improvement adopted by the State at an early day, and must be regarded as a public easement and not as private property. The cost of its construction and maintenance is reimbursed by a toll levied by public authority for the purpose. The company cannot close it to the public nor discriminate in favor of any particular person or class of persons. All have the right, upon payment of the toll regulated by law, to use it as common highway. I am very clearly of the opinion that it is a public highway within the contemplation of the law permitting an indictment for the obstruction of travel on highways.

"2. Is the Northern Central Ry. Co. liable to indictment for obstructing this turnpike road in the manner in which it has done in the construction of its railroad over it? . . . The Susquehanna R. R. Co., incorporated by the Act of 14th April 1851, was by the provisions of its charter made subject to all the provisions and restrictions of the General Railroad Act, approved 19th February 1849. The Consolidation Act of 3d May 1854, consolidating this and other railroad companies into the Northern Central Ry. Co., provides, likewise, that such consolidation company shall be subject to the provisions of the General Railroad Act of 19th February 1849. The 12th section of the Act of 19th February 1849, very clearly points out the duty of the company in the construction of its railroad whenever it shall be necessary to cross or intersect any established road or way. It provides: 'That whenever, in the construction of such road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of the said company, so to construct the said road across such established road or way, as not to impede the passage or transportation of persons or property along the same.' The meaning of this language is plain; there can be no uncertainty about it. The company may construct its railroad across any established road or way, whenever it may be necessary to cross or intersect it; but, in doing so, it must so construct its road across such established road or way as not to impede the passage or transportation of persons or property along the same. If the company so construct its railway, across any established road or way, as to impede the passage or transportation of person or property over the same, it does, not only, what it has no right to do, but, what the law prohibits it from doing. The Northern Central Ry. Co., at this crossing, has so constructed its road as to be a serious inconvenience and dangerous obstruction to travel along the turnpike road, which is an established road or way, and thus has committed an act wholly unauthorized and illegal, and that this is an indictable nuisance, cannot, I think, be seriously doubted. The offence consists, not in crossing the turnpike road, but in the manner in which the crossing is constructed. The company has the right to

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cross it, but in doing so, it must so construct its railroad as not to obstruct the public travel or transportation of property over it.

"Corporations, other than municipal, may become amenable to the criminal law for public nuisance and may be indicted therefor: Canal Co. *v.* The Commonwealth, 10 P. F. Smith, 367.

"It is the opinion of the court upon the facts found by the special verdict: 1st. That the turnpike road, made by the Harrisburg, Carlisle, and Chambersburg Turnpike Road Co., is a public highway within the contemplation of the law permitting an indictment for the obstruction of travel on highways. 2d. That the Northern Central Ry. Co. is liable to indictment for obstructing the said turnpike road in the manner in which it has done in the construction of its railroad upon it. Therefore, the verdict of the jury must be entered against the Northern Central Ry. Co., finding it guilty in manner and form as it stands indicted.

"And now it is entered as the verdict of the jury, that the Northern Central Ry. Co., the defendant in this case, is guilty in manner and form as it stands indicted, and thereupon, the sentence of the court is, that the Northern Central Ry. Co. abate the nuisance set forth in the indictment on or before the first day of April next, and pay a fine of one dollar and the costs of prosecution."

The defendant took this writ, assigning for error the overruling of the special pleas, and in entering the verdict as above.

John Hays and A. B. Sharpe, for plaintiff in error.—This turnpike is not a public highway: Act June 13th 1836, Purd. Dig. 1284, pl. 99; 73d sect. of Criminal Code, March 31st 1860, Purd. Dig. 336, pl. 108; Harding *v.* Inhabitants of Medway, 10 Metc. 469; 3 Bac. Abr. 493, Highways; Wood's Law of Nuisance, sect. 235; Clark *v.* Commonwealth, 9 Casey, 114. Where an indictment lies for nuisance in obstructing a public highway, it means a highway laid out under the Act of June 13th 1836. This is not a highway, because it is not so declared by its act of incorporation; the legislature cannot vacate it; it is a contract which a subsequent legislature cannot impair; the duty of keeping it in repair is not imposed upon supervisors, as in the Act of 1836; it is required to pay all damages for land taken; it is not open and free to every one; it has the right to take toll. Granting this to be a public highway, the railroad company had a right to obstruct it as they did, provided they did not unnecessarily interfere therewith: Act of February 19th 1849, Purd. Dig. 1290, pl. 38; Commonwealth *v.* Erie and North-east R. R. Co., 3 Casey, 355; Little Miami R. R. Co. *v.* Commonwealth, 16 American Railway Reports, 285; Nashville and Decatur R. R. Co. *v.* State, 15 Id. 234; Town Council *v.* Providence and Springfield R. R. Co., 6 Id. 139. The remedy for the turnpike company is provided in its charter, and this indictment, therefore, will not lie.

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George S. Emig, F. E. Beltzhoover and S. Hepburn, Jr., for the Commonwealth.—This is a public road. It is open to all people who pay a toll. There is no difference between a road laid out by the authority of the legislature and one laid out by a township under a decree of court. The public pays to pass over either; on the one a toll and on the other a tax, and both are equally public highways: Commonwealth *v.* Wilkinson, 16 Pick. 175.

The finding of the jury is that the crossing as made is a serious inconvenience and a dangerous obstruction to travel. Surely this impedes the passage or transportation of persons or property along the road, within the meaning of the Act of Assembly.

No matter what remedies there may be for individuals against the turnpike company, the common-law remedy against a party obstructing a public highway remains. Time does not run against the State.

MERCUR, J.—It is well recognized law, that an indictment will lie against a corporation, not municipal, for the creation and maintenance of a public nuisance: Reg. *v.* Great North of England Ry., 9 Q. B. 315; Duter *v.* Troy R. R. Co., 2 Hill, 629; Chestnut Hill Turnpike *v.* Rutter, 4 S. & R. 6; Delaware Div. Canal Co. *v.* Commonwealth, 10 P. F. Smith, 367. This indictment charges the plaintiff in error with having, unlawfully and injuriously, obstructed a public highway. The obstruction in question is in a turnpike, and caused by the manner in which the railroad crosses the same. The special verdict finds the mound, caused by the railroad crossing the turnpike, "amounts to a serious inconvenience and a dangerous obstruction to travel." The mere construction of a railroad track across a public highway, in pursuance of law, is no nuisance: Danville R. R. Co. *v.* Commonwealth, 23 P. F. Smith, 29. But it must be constructed in such a manner as "not to impede the passage or transportation of persons or property along the same:" Act of 19th February 1849, Purd. Dig. 1220. The necessary running of trains across the highway is not the cause of complaint here; it is the construction of a permanent obstacle in the highway, which is "a dangerous obstruction to travel," and the maintenance of it there. Such an obstruction of a public highway is clearly a nuisance. It is contended, however, that a turnpike, constructed by a corporation, is not a public highway.

The main object and purpose of a turnpike is to provide a public highway of a superior quality. That it is not a private road or way is very clear. It is not constructed under the supervision of municipal officers; yet it is by virtue of public authority, and for public purposes. It is for the use of every person desiring to pass over it, on payment of the toll established by law. It differs from a common highway in the fact that it is not constructed, in the first instance, at the public expense, and the cost of construction is reim-

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bursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. The same public annoyance and injury arises from its obstruction as if it was a common highway. Hence, in Lancaster Turnpike Co. *v.* Rogers, 2 Barr, 114, it was said, that when the turnpike company ceased to use a building erected, in part on the turnpike, as a toll-house, it ceased to be there for a lawful purpose, and became a public nuisance. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway, in so far that an indictment will lie against one obstructing it, as for a public nuisance. It was so held in Commonwealth *v.* Wilkinson, 16 Pick. 175.

The Statute of Limitations runs not against the Commonwealth. Twenty-four years of continued nuisance create no presumption of a grant therefrom to maintain the same. Nor does the fact that the Act of Assembly gives the turnpike company a specific remedy for an injury to its rights, impair the separate rights of the Commonwealth. The owner of the fee of land over which a common highway passes may maintain trespass against one who deposits and maintains materials thereon: Lewis *v.* Jones, 1 Barr, 336. Yet this in no wise bars the right of the Commonwealth to indict for the same act. So in the present case, the right of the Commonwealth to redress a public wrong is very clear. It is no sufficient answer to the wrong committed by the plaintiff in error to prove that it would require an expenditure of from $5000 to $8000, to so lower the bed of the turnpike as to allow it to pass under the railroad. Whether that is the least expensive manner of removing the dangerous obstruction, we are not informed; but if it be, the sum is not so great as to absolve the railroad company from its duty of so making the crossing that it shall not endanger the reasonable passage of persons and transportation of property over the turnpike. The learned judge committed no error.

Judgment affirmed.

See Little Miami R. R. Co. *v.* Greene Co., 31 Ohio St. 338. Gear *v.* Chicago etc. R. R. Co., 48 Iowa, 88.

O'CONNOR

v.

ST. L. K. C. & N. R. CO.

(*Advance Case, Iowa, October* 21, 1881.)

Where the fee of a street is in a municipal corporation, and such corporation grants a railroad company the right to construct its track and operate its road thereon, such company is not liable to an abutting lot-owner for consequential damages unless they result from the negligent or improper construction of the road.

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Certain instructions given in this case considered, and *held* erroneous, as being inapplicable to the issues made by the pleadings.

Where lots abutting on a street are injured by reason of the improper construction of a railroad through the street, the true measure of damages is the difference in the rental value of such lots with road as constructed; and the rental value had it been properly constructed.

APPEAL from Van Buren circuit court.

The plaintiff is the owner of a lot in the city of Ottumwa, and in his petition, which consists of three counts, states in the first that the track of defendant's road is constructed in said city along and across Mill street, and then it crosses said street; there is an embankment 12 feet higher than the grade of the street over which said road is operated, and that said embankment "is impassable for ordinary vehicles," so that the said lot "is not accessible from and over said Mill street; . . . that the defendant permits the said embankment to remain so contructed in and across said Mill street, and continues to obstruct plaintiff's ingress and egress to and from said lot, to his" great damage. In the second count it is stated that said lot extends back to an alley, and defendant "has caused a track of its said road to be laid down and over and across said alley . . . so close to the line of said lot that in using said track last named the defendant uses and occupies of said lot at least seven feet," and in running cars over said track "run over and upon the fence of petitioner," and broke and destroyed the same, to his great damage. It was stated in both of said counts the road was run and operated without right or authority. The third count need not be set out. There was a denial of the allegations of the petition and trial by jury. Verdict and judgment for the plaintiff, and defendant appeals.

Trimble, Carruthers & Trimble, for appellant. H. B. Hendershot, for appellee.

SEEVERS, J.—In 1866 the city of Ottumwa passed an ordinance granting the right of way over and upon the street and alley aforesaid to the St. Louis & Cedar Rapids Railroad Company. The conditions upon which said right was granted were that the company should "make all necessary culverts or openings for good drainage, and keep up good crossings of the track when necessary." To the rights of said company the defendant has succeeded. The jury were instructed as follows: The plaintiff concedes in this case "that the fee of the streets and alleys of the city of Ottumwa is in the public, and thence, under the ordinance in evidence, . . the defendant would have the right to construct its road over and across Mill street, in said city, and would not be liable for so doing to the plaintiff . . . unless . . . such right was exercised in an improper or negligent manner. The ordinance does not fix any grade or elevation which the defendant shall not exceed in crossing said street, and hence there is no particular elevation at

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which [the defendant] would be required to cross the street, nevertheless [the defendant] would not have the right to construct the road at any grade it might choose, . . . but it would be its duty to construct the same at no greater elevation than was reasonably necessary and proper for the construction of its road on and over said street; but, when constructed at such elevation as was reasonably necessary and proper, the defendant would not be liable for and on account of the elevation of the embankments on and over said street."

No complaint is made of these instructions; they therefore constitute the law of the case, and they are in accord with Slaten *v.* D. V. R. Co., 29 Iowa, 148, and Cadle *v.* M. W. R. Co., 44 Iowa, 11, the rule being, briefly stated, that the defendant is only liable for the negligent or improper construction of its road. The court also instructed the jury that while the foregoing is the rule, still it was the defendant's duty to construct good, safe, and sufficient crossings over its railway, and "in constructing such crossings . . . it would be the defendant's duty to do so with due regard to the convenience of the public travel thereon, as well as to the plaintiff's right of ingress and egress to his lot." By this instruction, as we understand, the court meant the failure to put in crossings might amount to negligence or improper construction. In so instructing the jury we think the court erred, because there is no allegation in the petition the crossings were defective, or there were none constructed, or that the road was constructed in an improper manner, because there were no crossings, or that the same were necessary. The instructions are erroneous, because inapplicable to the issue. The only ground upon which damages are asked in the petition is that the embankment is 12 feet higher than the grade of the street, and because of this fact access to the lot is cut off or rendered difficult.

2. As to the alley, damages are sought to be recovered on two grounds only—First, because the track occupies a portion of the plaintiff's lot; and, second, of the breaking down of the fences. Such being the issue, the court instructed the jury that "the defendant had the right to construct its railway along the alley in the rear of plaintiff's lot, unless in so doing the plaintiff would be deprived entirely of the use thereof, and his approach to his lot was entirely obstructed thereby; and, except as aforesaid, the defendant would not be liable for so doing, unless it constructed or located the same in a careless or negligent manner." This instruction is erroneous, because inapplicable to the issue,—it not being alleged the road had been improperly constructed along, over, or across the alley. Nor is any complaint made because the whole alley is occupied, and the plaintiff excluded therefrom and from his lot.

3. Evidence was introduced, against the defendant's objection, tending to show the rental value of the property before the road

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was constructed and afterwards. It should have been excluded, because no distinction was made between a proper and improper construction of the road. The true measure of damages in such cases has been held to be the difference between tha rental value of the lot with the road as constructed, and the rental value if it had had been properly constructed. Cadle *v.* Railroad Co. before cited.

It is deemed unnecessary to notice the other errors alleged. Reversed. See note, 3 Am. and Eng. R. R. Cas. 218.

THE KINSMAN STREET R. R. Co.

v.

THE BROADWAY & NEWBURGH STREET R. R. Co. ET AL.

(36 *Ohio State Reports*, 239. *January Term*, 1880.)

The plaintiff, a street railroad corporation, obtained from the city council of Cleveland the right to construct and operate its road through certain streets of the city, upon certain terms and conditions expressed, and subject to such other terms and conditions as the council might thereafter prescribe. Among the conditions expressed, it was stipulated that a certain other railroad company, then in existence, should be allowed to run its cars upon a portion of the plaintiff's road, upon the payment of such reasonable compensation as the council should prescribe, if the parties were unable to agree. Afterward, another company was organized, to which was granted the right of way along certain streets, and also upon a portion of the route already occupied by the plaintiff, and upon its track, upon the payment to the plaintiff of a reasonable compensation. These companies failing to agree upon the amount to be paid, the council prescribed a certain sum, which was tendered, but refused by the plaintiff. Thereupon, the plaintiff brought suit against said other last-mentioned company to enjoin said company from using any portion of its track, alleging, among other things, that the compensation so prescribed and tendered was inadequate, which allegation was negatived by defendant. *Held*,

That the plaintiff did not acquire an exclusive right to use the route upon which its road was constructed.

That the property of the plaintiff in its track was subject to be taken for a like public use in common, upon compensation being first made.

That the council stipulated for the right, in such case, to prescribe a reasonable compensation.

That, without proof that the amount of compensation so prescribed and tendered was inadequate, the plaintiff is not entitled to an injunction.

APPEAL. Reserved in the District Court of Cuyahoga County.

This action is prosecuted by the plaintiff corporation against the defendant corporation, the president and directors thereof, the city of Cleveland, the mayor and members of the city council, for the sole purpose of obtaining an injunction perpetually restraining the defendant corporation from running its cars upon the track of the plaintiff corporation's railroad.

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In the court of common pleas a decree was entered for the defendants, from which the plaintiff appealed to the district court, where the cause was reserved for decision in this court. The case is now submitted to this court, as it was to the common pleas, upon the petition of the plaintiff and the answer of the Broadway & Newburgh Street R. R. Co.

From these pleadings and the exhibits attached, it appears that the rights of the parties depend on the following state of facts:

On September 20, 1859, the council of the city of Cleveland passed "an ordinance prescribing the terms and conditions of street passenger railways within the city of Cleveland," of which the first section was as follows:

That any company organized for the purpose of laying down rails for running street passenger cars to be drawn by horses or mules through the streets of Cleveland, shall be guided, governed and regulated by the following conditions, and such restrictions as the council may hereafter pass.

On October 25, 1859, the following resolution was adopted by the council:

"Whereas, the Kinsman Street R. R. Co. have complied with the second section of the ordinance, entitled "An ordinance to prescribe the terms and conditions of street passenger railroads, in the city of Cleveland," passed September 20, 1859, by publication of the notice therein prescribed, and have also presented to the council the written assent of two-thirds of the holders of the land fronting on the respective streets proposed to be occupied by said railway, therefore,

"Resolved, That said Kinsman Street R. R. Co. be, and hereby is, permitted to lay a single track railway from the east end of Kinsman street on and along the center of said street, to its intersection with Erie street; thence on and along the center of Erie street to Superior street; thence on and along the center of Superior street to the east line of the Public Square; thence on and along the center of the roadway around the north side of said square to Superior street; thence on and along the centre of Superior street to Bank street; thence on and along the center of Bank street to Wall street; and thence on and along the center of Wall street to Bath street, under the terms and conditions prescribed by said ordinance, or which may hereafter be prescribed by the city council; provided, that said company shall commence the construction of said railway by the first day of January, 1860; and complete the same by the 1st day of January, 1861; and provided, also, that the East Cleveland R. R. Co. shall be allowed to to use the track of said Kinsman Street R. R. Co., from the intersection of Prospect street with Erie street to the Public Square, upon reasonable terms, to be prescribed by the council, unless agreed upon by the parties. This license shall continue 20

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years from and after the passage of the ordinance regulating street railroads, passed September 20, 1859; provided, that said railroad company shall comply with the ordinance now existing and the further order of the council in relation to keeping the streets, through which said roads shall be laid, in repair, as the council shall, from time to time, direct; and, at any time said company shall fail to comply therewith, this, their said license, shall cease."

Afterward the Kinsman Street R. R. Co., by resolution of the council, was authorized to construct a double-track railroad, and to so change the route of its road as to cross Erie street to Pittsburgh street (now Broadway); thence along the center of Broadway and Ontario streets to the Public Square (now called Monumental Park); thence west and north on the street leading around the Public Square to Superior street, on the line of its first location, "subject, however, to the same terms, conditions and restrictions as are now imposed by ordinance, or in the permission heretofore granted to said company by resolution of the council, passed October 25, 1859, and that the said Kinsman Street R. R. Co. be allowed until January 1, 1862, to finish and complete their road."

Under the grant of privileges thus obtained from the city, and subject to the terms and conditions contained in the ordinance and resolutions above referred to, the plaintiff constructed its road upon the streets of the city above named, and continued to use and operate the same without interruption until the happening of the alleged grievances hereafter mentioned.

The Broadway and Newburgh Street R. R. Co., having a road or the right to construct one, for several miles in length, terminating at the initial point named in the following ordinance, the city council, on April 7, 1874, ordained as follows:

"Section 1. Be it ordained by the city council of the city of Cleveland, that the Broadway and Newburgh Street R. R. Co. be, and the same is hereby authorized and permitted to use and occupy for a double-track street railroad the following parts of streets and public grounds: commencing at the point near the southerly end of Central Market, where the track of the Kinsman Street R. R. Co. intersects Broadway; thence northerly along Broadway to its intersection with Ontario street; thence along Ontario street to Monumental Park; thence along the carriage way around the southwesterly part of said park to Superior street; and thence westerly along Superior street to Water street, but subject to such rights as the Kinsman and East Cleveland Street R. R. Cos. now have therein, and also to the following terms and conditions:

"First.—The present charge for carrying passengers by the Broadway & Newburgh Street R. R. Co., as fixed by ordinance, shall not be increased by reason of the authority and permission hereby granted.

"Second.—Said company shall be subject to such liabilities and

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restrictions as are imposed by ordinance on any other street railroad company now permitted to use and occupy any portion of the described parts of said streets and grounds.

"Section 2. This ordinance shall not be construed as authorizing the laying down of any other than the existing street railroad tracks in the described parts of streets and grounds, nor shall said Broadway & Newburgh Street R. R. Co. exercise authority and permission granted by the first section of this ordinance until it shall have lawfully acquired the right to run its cars on said existing street railroad track."

On July 14, 1874, the second section of the above ordinance was amended so as to read as follows:

"Section 1. Be it ordained by the city council of the city of Cleveland, that section two of 'An ordinance granting the Broadway & Newburgh Street Railroad Company the right to use and occupy certain streets for a street railroad, and prescribing the terms and conditions thereof,' passed April 7, 1874, be and the same is hereby so amended as to read as follows: This ordinance shall not be construed as authorizing the laying down of any other than the existing street railroad tracks in the described parts of streets and grounds. But said Broadway & Newburgh Street R. R. Co. may run its cars on the street railroad tracks now laid in said described parts of said streets and grounds, on such terms of compensation to the Kinsman Street R. R. Co. as may be agreed upon by the parties, and in case of failure or inability to make such agreement within thirty days from the date of the passage of this ordinance, such terms of compensation shall be prescribed by the city council."

And on October 27, 1874, the following ordinance was adopted by the council:

"An Ordinance—Prescribing the terms upon which certain railroad companies shall occupy certain streets of the city for street railroad purposes.

"Section 1. Be it ordered by the city council of the city of Cleveland, that the terms of compensation, as contemplated by the amendatory ordinance passed July 14, 1874, be, and the same are hereby prescribed as follows:

"First. Said Broadway and Newburgh Street R. R. Co. shall pay to the Kinsman Street R. R. Co. the sum of three thousand five hundred and twenty-two ($3,522) dollars, the same being one-half of the ascertained value of the said tracks in Broadway and Ontario street, including the street railroad pavements laid therewith, and shall pay to the Kinsman Street R. R. Co. one-half the the expenses hereafter incurred in keeping said tracks and pavements in repair, as the ordinance of the city requires, or in making such changes or alterations in said track as the city council may hereafter require.

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"Second. Said Broadway and Newburgh Street R. R. Co. shall pay to the Kinsman Street R. R. Co. and the East Cleveland Street R. R. Co., or to either of said companies having the right to receive the same, the sum of two thousand one hundred and fifty-three ($2,153) dollars, the same being one-third the ascertained value of the said tracks on Monumental Park and Superior street, including the street railroad payments laid therewith, and shall pay to said company or companies one-third the expense hereafter incurred in keeping said last named tracks, turn-tables and pavements in repair, as the ordinance of the city requires.

"Section 2. That the terms of compensation prescribed by the first section of this ordinance be and the same are hereby made conditions of the license heretofore granted to said street railroad companies to use and occupy the described streets and public grounds, and said companies are hereby required to assent to said terms as part of said licenses."

The amount of compensation thus fixed was tendered by the defendant corporation, but was refused by the plaintiff. Whereupon the plaintiff commenced this action, and alleged, among other things, in its petition, that the terms of compensation as stated in the ordinance of October 27, 1874, was wholly inadequate and unjust, and the several sums of money fixed by the council as such compensation are not one-fourth the cost or value of plaintiff's track along the route indicated in said pretended ordinance, and does not allow the plaintiff any compensation whatever for the paving of said streets and carriage-ways by plaintiff, which paving was done by plaintiff pursuant to and under the requirements of the ordinance of said city, granting to plaintiff the right to use and occupy such streets and ways; and said terms of compensation do not include the damage to plaintiffs' franchise and right to collect fares from passengers between Atwater Block and Central Market, and the consequent diminution and decrease of plaintiff's revenue, derived from carrying of passengers, and collecting fares for the same over and upon said streets and ways; which said damage would amount to more than $50,000. And said terms of compensation do not include the damage which plaintiff would sustain by reason of the inconvenience and loss of business resulting to plaintiff by the necessary inconvenience and trouble resulting to plaintiff by its track being used by said Broadway and Newburgh Company, and by the running of its cars during short intervals over plaintiff's road, and which use of plaintiff's tracks and running of cars could not be controlled by plaintiff. Plaintiff says such inconvenience, trouble, and consequent loss of business would damage the plaintiff to the extent of $5,000 or more.

The allegation of inadequacy of such compensation, is, however, negatived by the answer of the Broadway and Newburgh R. R. Co.

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J. K. Hord, for plaintiff in error:

The council could not acquire a power by an act of reservations. A right can only be reserved when it is already possessed. New York City *v.* Second Avenue R. R. Co., 34 Barb. 416; s. c. 33 N. Y. 261.

The rails and material used in constructing the track, turn-tables, switches, etc., of the Kinsman street road are strictly the property of the plaintiff. Jersey City and B. R. R. Co. *v.* Jersey City and Hoboken R. R. Co., 20 N. J. Equity, 61; Metropolitan R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262–267, 270.

In addition to this material property, the plaintiff has acquired a right to use the streets of the city to lay its rails, and the exclusive right to run its cars and collect fares for the carrying of passengers thereon. These constitute its franchise, which is also a right of property equally entitled, with its material property, to the protection of the law. New York *v.* Harlem R. R. Co., 50 Barb. 285; Brooklyn Cen. R. R. Co. *v.* Brooklyn City R. R. Co., 32 Barb. 358; Attorney-General of N. Y. *v.* Mayor of N. Y. 3 Duer, 114.

And this franchise and incorporeal right has been in part acquired by the act of appropriation, and the exercise of the delegated right of eminent domain. See the language of the statutes of Ohio, S. & S. 136, §§ 104, 137; § 107; S. & C. 278, § 29, Act of 1852; Hilliard on Injunctions, 516, §§ 13, 14; People of N. Y. *v.* Kerr, 27 N. Y. 188–191; People of N. Y. *v.* Law, 34 Barb. 494; Cin. & Spring Grove Av. R. W. *v.* Cummings, 14 Ohio St. 523; Roberts *v.* Easton, 19 Ohio St. 78.

This right of property in the material and franchises of the plaintiff can be appropriated to a public use by the exercise of the right of eminent domain. But such appropriation can only be made by legislative authority, and in the mode prescribed by law. Sixth Avenue R. R. Co. *v.* Kerr, 45 Barb. 138; Boston *v.* Lowell R. R. Co., 2 Gray, 1; Metropolitan R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262; Matter of Kerr, 42 Barb. 119–121; Waterworks Co. *v.* Burkhart, 41 Ind. 474.

The right to re-appropriate or take from a corporation the properties which it has acquired by an act of appropriation is an exercise of the high prerogative of eminent domain, and cannot be exercised without express legislative authority. It cannot be exercised under a merely implied authority. Hatch *v.* R. R. Co., 18 Ohio St. 92–119; Hickox *v.* Hine, 23 Ohio St. 523–531; R. R. Co. *v.* Dayton, 23 Ohio St. 518; Springfield *v.* Conn. River R. R. Co., 4 Cush. 61, 69–72.

Express legislative authority was necessary to enable a railroad company to take or appropriate public streets or alleys, or grounds appropriated in any way to a public use (S. & C. Statutes, 378, § 29), or to appropriate or use a bridge constructed by another company. 57 Ohio L. 10, § 12.

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The right to take, appropriate, or use the track or other material of plaintiff, or its franchise, has not been conferred upon the B. & N. Company by the legislature, neither directly nor indirectly. S. & C. Statutes, 278, § 29; S. & S. Statutes, 136, §§ 104–107, 108, 113.

One competing street railroad company cannot take, by the exercise of the right of eminent domain, a part of a competing road in successful operation, and the most valuable part of it. Central City Horse Ry. Co. *v.* Ft. Clark Ry. Co., 81 Ill. 533.

In this case the attempt was made by one company to condemn and appropriate, in the regular way, a part of the track of another company. To prevent this an injunction was allowed and made perpetual. No right has been conferred upon the city council to to take private property, except for its own use, and no authority has been conferred upon it to take any other than real property for any purpose, and no authority, either express or implied, has been delegated to it to take the property of one corporation for the use of another. 66 Ohio Laws (Muncipal Code), 217, §§ 411, 412, 413, 414; S. & S. Statutes, 137, §§ 105, 106; 67 Ohio L. 72, § 199, and p. 74, par. 33.

The legislature has supreme control over the streets of a city. People *v.* Kerr, 27 N. Y. 188–192.

The attempt of the city council to appropriate the use of plaintiff's property to the B. & N. Co. is a usurpation of power, and is not warranted by law. People *v.* Law, 34 N. Y. 494.

The right of plaintiff to lay its rails upon the streets of the city was granted by the council, "subject to such restrictions as the council may hereafter pass." This reservation does not confer upon the council the right to interfere with plaintiff's franchise, nor to place upon its track the cars of a competing company. A right of appropriation cannot be acquired by a mere reservation. The "restrictions" mentioned in the ordinance only refer to such police regulations as the council may impose upon any person or corporation using the streets of the city. Mayor of N. Y. *v.* Second Avenue R. R. Co., 34 Barb. 41–45; affirmed by the court of appeals in 32 N. Y. 261; Paterson & Passaic R. R. Co. *v.* Mayor of Paterson, 24 N. J. Equity, 158–164.

The passing of an ordinance by the city council, authorizing plaintiff to occupy parts of certain streets for a street railroad, subject to certain conditions, and the acceptance of the conditions by plaintiff, and laying its track and perfecting its road under the ordinance, constitutes a contract between the city and plaintiff, which cannot be arbitrarily changed by the council without the plaintiff's consent. East Hartford *v.* Hartford Bridge Co., 10 How. U. S. 510; 18 Curt. 483; Mayor of N. Y. *v.* Second Avenue R. R. Co., 34 Barb. 41–45; affirmed in 32 N. Y., 261; Brooklyn Cen. R. R. Co. *v.* Brooklyn City R. R. Co., 32 Barb. 358–364; Attor-

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ney-General of N. Y. *v.* Mayor of N. Y. City, 3 Duer, 119, 146–149; Mayor *v.* Troy, 49 N. Y. 657; B. & L. R. R. Co. *v.* S. & L. R. R. Co., 2 Gray, 1; ordinance of city council, September 20, 1859, § 13. See compilation of City Ordinances, 1868, p. 652; ordinance February 10, 1832, § 9; Compilation of 1863, p. 299.

The action of the city council in such a case is not a legislative act, but is the same as would be the act of an individual dealing with rights of property. See 34 Barb. 41–45; 32 N. Y. 261.

When a railroad has been laid down in the streets in pursuance of the statute and with the assent of the municipal corporation, it does not become a part of the street, so as to authorize the public at large or another company, with the consent of the council, to use the railroad with cars in common with the owners of the franchise. Brooklyn Central R. R. Co. *v.* Brooklyn City R. R. Co., 32 Barb. 358–361. See also 20 N. J. Equity, 61; 21 N. J. Equity, 550; 12 Allen, 262, 272, and 24 N. J. Equity, 158–164, previously cited.

A company, having lawfully laid its track in the streets, is entitled to compensation from another company using the whole or a part of its track. 45 Barb. 138; 12 Allen, 262–271; 42 Barb. 119–121; 41 Ind. 364, and 34 N. Y. 494–507, previously cited.

And the first company is entitled to all fares collected on its road, less cost of transportation, which should be included in estimating compensation to be paid for the use of the company's track. 12 Allen, 271.

If a competing company is permitted to lay its own track in a street occupied by the track of another company, the owners of the first track are entitled to compensation. 45 Barb. 138, previously cited.

The right of the legislature to repeal or amend acts of incorporation does not include a right, on the part of the legislature or city council, to interfere with vested rights, nor rights of property, nor to pass laws or ordinances affecting the validity of contracts. McArthur *v.* Kelly, 5 Ohio, 139; Toledo Bank *v.* Bond, 1 Ohio St. 622; Shaw *v.* Starret, 4 Ohio St. 494; Lamb *v.* Lane, 4 Ohio St. 167; Matheney *v.* Golden, 5 Ohio St. 361; Ross Co. Bank *v.* Lewis, 5 Ohio St. 447; Sandusky City Bank *v.* Wilber, 7 Ohio St. 481; Dartmouth College *v.* Woodworth, 4 Wheat. 518; 32 Barb. 358; 3 Duer, 119, previously cited.

Injunction is the proper remedy in a case of this kind. People *v.* Law, 34 N. Y. 494, 506, 507; Boston Water Power Co. *v* Boston, 16 Pick. 512, 525, 526; B. & L. R. R. Co. *v.* S. & L. R. R. Co., 2 Gray, 1; Hilliard on Injunctions, 362, § 8, and 516, §§ 13, 14; C. C. Horse R. W. Co. *v.* Ft. Clark Horse R. W. Co., 81 Ill. 533.

John Coon, for defendant in error:

We submit:

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1. That the plaintiff had acquired no exclusive privileges in the streets and grounds mentioned. Railroad Co. *v.* Kerr, 45 Barb. 138; 18 Ohio St. 262; Railway Co. *v.* Cumminsville, 14 Ohio St. 523.

2. That the plaintiff retains no such right of property in the material composing the tracks in question, as can support its claim to an exclusive right to use the same. 1 S. & C. Statutes, 278, § 12.

3. That the permission granted to the defendant to use said tracks jointly with the plaintiff, is not a taking of private property. People *v.* Kerr, 47 Barb. 357; 27 N. Y. 188; Railroad Co. *v.* Brownell, 24 N. Y. 345; Railroad Co. *v.* Kerr, 45 Barb. 138.

4. Granting a proprietary interest in such material to the plaintiff, the permission to the defendant contains just and lawful provision for the ascertainment and adjudication of the plaintiff's damages; and by such adjudication the defendant acquired the right to use the tracks, and the plaintiff acquired a right of action to recover the damages awarded as compensation. Railway Co. *v.* Railway Co., 21 N. J. Eq. 550.

5. The city of Cleveland holds its public streets and grounds for only the purposes and uses of their dedication; and the permission to the defendant is within the requirements of this trust.

McIlvaine, C. J.—The true relation between the city of Cleveland and the Kinsman Street R. R. Co. is the question of prime importance in this case. The power to regulate and control the public streets of the city is lodged in the municipal authorities. The object in conferring this power, and its exercise by the city council, are, and should be, to conserve the public welfare and convenience. One of the modes of promoting this welfare and convenience is through the establishment of street railroads. The plaintiff corporation, organized under the general incorporation act of May 1, 1852, by section 12 of the act was bound to recognize this power of the municipal authorities over the streets of the city. Section 12, as amended April 15, 1857, provides: "If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the mnnicipal or other corporation or public officer or public authorities owning or having in charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals,"

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&c. Under the authority of this section, the plaintiff and the city authorities agreed upon the terms and conditions upon which the plaintiff's road was constructed upon the streets of the city.

While we think that it was not within the power of the municipal authorities, by such agreement, to confer upon the plaintiff the right to use these streets for railroad purposes, to the exclusion of all other persons or corporations, if the public welfare or convenience should require a further similar use; we also think that no such exclusive right was intended to be conferred. If an exclusive privilege was intended, it should have been expressed, and we find in the ordinance and resolutions relied on, not only the absence of such expression, but, on the other hand, a different intention indicated. In the ordinance of September 20, 1859, it was declared that "any company organized for the purpose of laying down rails and running street passenger cars to be drawn by horses or mules through the streets of Cleveland, shall be guided, governed and regulated by the conditions (therein expressed) and such restrictions as the council may hereafter pass." And in the resolution of October 25, 1859, containing the grant of right to the plaintiff specially, it is provided that the right is granted "under the terms and conditions prescribed by said ordinance" (of September 20, 1859), "or which may hereafter be prescribed by the city council." And a like stipulation is contained in the subsequent resolutions authorizing a change of route. We have no doubt that under the power thus stipulated for (if such reservation had been at all necessary) the municipal authorities might at any time thereafter (if it was thought the public convenience required it) grant the like privilege to another company to use and occupy the same streets, and indeed the same route, for railroad purposes, to be used in common with the company or companies to whom the privilege was first granted.

What we have already said in refutation of an exclusive right in the plaintiff to use the route upon which its tracks were laid for street railroad purposes, does not in the least conflict with its right of private property in the material of which its road is constructed. Such material, in place, is as strictly the private property of the corporation as it was before it was placed, save in this only, that having been placed in a public street, it was thereby dedicated to the ordinary use of the public; but, as a railroad, such material remains the private property of the company, and for such purpose it is subject to the use and control of the owner exclusively. When, therefore, a right of way for street railroad purposes is granted over the same route to another company by the municipal authorities, the private property of the former cannot be appropriated by the latter company until compensation is first made by the latter to the former company. And in the absence of a stipulation to the contrary, it is quite clear to our minds that the munici-

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pal authorities have no more power to fix the amount of compensation that should be paid by the latter to the former company for the right to the joint use of such material than it has to determine the compensation to be paid to other owners of private property taken for the same public use. In such case, if no agreement be made between the companies as to the matter of compensation, or the same be not assessed by a jury as in other cases of the condemnation of private property to public uses, the latter company should be enjoined from the forcible appropriation.

But in this case we find a stipulation to have been made; namely, that the plaintiff would lay its tracks under the terms and conditions prescribed by the ordinance of September 20, 1859, or which might thereafter be prescribed by the city council; and, also, that the East Cleveland Street R. R. Co. (a corporation then in existence) should be allowed the use of the plaintiff's track upon reasonable terms, to be prescribed by the council, unless agreed upon by the parties. The right of the council to prescribe "terms and conditions" in the future, it seems to us, was sufficiently broad to cover a future exigency like the one then existing, and specially provided for; namely, an exigency arising from the necessity to provide for the public welfare by running the cars of other street railroad companies over the track of the plaintiff. And this being so, the only question remaining is, was the condition as to the compensation to be paid by the Broadway & Newburgh Co. to the plaintiff reasonable? In other words, was the compensation, as fixed by the council, fair and adequate? Upon this question issue was joined, but no testimony offered. The burden of showing its inadequacy rests upon the plaintiff. Under these circumstances, the injunction prayed for must be denied.

Petition dismissed.

See Citizens' Coach Co. v. Camden, etc., R. R. Co., 1 Am. and Eng. R. R. Cas. 190.

MUNHALL

v.

PENNSYLVANIA R. R. Co. and ALLEGHENY VALLEY R. R. Co.

JACKSON & BROTHER *v.* SAME.

(92 *Pennsylvania Reports*, 150. *January* 5, 1880.)

Railroad companies have an undoubted right to enter into a just and fair arrangement with a corporation or association whereby their business will be increased, although the effect of the arrangement may be to take business from others. With a view of increasing their business, they may extend more favorable terms to all shippers, although others engaged in the same business may be incidentally injured thereby. The fact that the public patronize those lines of transportation which give the most favorable terms constitutes no ground of complaint.

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The Allegheny Valley R. R. crosses the Pennsylvania R. R. at Allegheny Junction. To compete more successfully with the river transportation, the Allegheny Valley R. R. carried crude oil to the refineries at Pittsburg, and the manufactured product back to Allegheny Junction, at a uniform rate, thus giving to the refiner at Pittsburg as favorable terms as if located at Allegheny Junction, and thereby securing a uniform rate on oil from the oil regions to the seaboard. *Held*, that to deny the right to make such an arrangement would be an unwarranted interference with the management of the business of the railroad, and deprive the public of the benefit of the competition to which it is justly entitled.

The right of connecting railroads to make contracts for through rates is incident to their powers unless prohibited by their charter. Where such contracts are not unjust, unconscionable or in restraint of trade, they will not be interfered with.

NOVEMBER 14th, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY and STERRETT, JJ. GREEN, J., absent.

Error to the Court of Common Pleas, No. 1, of Allegheny county: Of October and November Term, 1878, No. 73 and 74.

Case by William Munhall against the Pennsylvania R. R. Co. and the Allegheny Valley R. R. Co., and by Jackson and Brother, against the same defendants.

These two actions were of like character, and depending upon like proofs, and by consent of the parties, were tried together in the court below.

They were actions against the Pennsylvania R. R. Co. and the Allegheny Valley R. R. Co. for conspiracy, and injuring the plaintiffs, respectively, in their business.

The plaintiffs were engaged in the transportation of crude oil in bulk-boats and barges, via the Allegheny River, from the oil regions of Pennsylvania to Pittsburg and vicinity, and in the prosecution of their business, had invested in and were using steamboats, barges, bulk-boats and other appliances specially built for and adapted to said trade. They had built up a steady and prosperous trade, and had been engaged in the same for a number of years prior to 1871. A large number of persons at Pittsburg and in the vicinity thereof were engaged in the business of refining crude oil, and shipping the refined product to the eastern markets over the Pennsylvania railroad. These refiners had been for several years the regular customers of the plaintiffs in their aforesaid transportation business.

The Pennsylvania R. R. was, and is, the direct route for transportation of refined oil from Pittsburg to the eastern market. During much of the time covered by the proofs in these cases it was the only route, and during the whole period was the principal and favorite route with refiners at Pittsburg and vicinity.

The Allegheny Valley R. R. was completed to Oil City and opened about the year 1869, and it has since been the only route

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by rail for the transportation of crude petroleum from the oil regions of Pennsylvania to Pittsburg and vicinity.

The natural and cheapest route for the transportation of crude petroleum from the oil regions of Pennsylvania to Pittsburg is the Allegheny River, and for some time after the opening of the Allegheny Valley R. R. to the oil trade, as above mentioned, the plaintiffs continued to supply their customers, the refiners, at Pittsburg and vicinity, with crude oil brought down the Allegheny River in their bulk-boats and barges.

In the year 1870, and prior thereto, in order to compete with the river trade in the transportation of crude petroleum to Pittsburg and vicinity, the Allegheny Valley R. R. Co. allowed rebates or drawbacks to shippers of crude petroleum over its road; but this policy left the plaintiffs to open competition, and they, by lowering their rates, retained their trade.

It was in evidence that early in the year 1870, at the office of the Allegheny Valley R. R., at Pittsburg, the president of the road remonstrated with a large transporter of crude petroleum to Pittsburg, and who had been receiving rebates from the road, against his running oil to Pittsburg by river, and then and there declared he would "fix this barge business so there couldn't be any more barge oil run on that river."

It was also in evidence that about 1870 the president of the Allegheny Valley R. R. declared to a Pittsburg refiner and a broker at Pittsburg for the purchase of crude petroleum for refiners, that the shipping of crude petroleum to Pittsburg by the river should be stopped, and that he would compel the barges "to stop the business and go out of the business."

Shortly thereafter the Pennsylvania R. R. Co. and the Allegheny Valley R. R. Co. entered into an arrangement whereby the Pennsylvania R. R. Co. allowed to Pittsburg refiners of crude oil upon eastern shipments of oil refined at Pittsburg and vicinity from crude petroleum brought to their refineries from the oil-producing regions of Pennsylvania, via the Allegheny Valley R. R., a drawback or rebate upon the freight or cost of transportation. But any such drawback or rebate was not allowed upon oil refined at Pittsburg or vicinity from crude petroleum brought there in barges or boats, via the Allegheny River. This general arrangement between the defendant companies, with some modifications in details, prevailed from the time it was entered into between the two roads, about 1870 or 1871, down to the trial of these cases.

The Allegheny Valley R. R. Co. (like the bargemen on the river), carried crude oil from the oil regions to Pittsburg at one uniform rate, without reference to the point at which it first reached the railroad. But it went a step further in competing with the rivermen. It carried crude oil to the refinery, and its manufactured product to Allegheny Junction, at one uniform rate.

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Pittsburg refiners—all of them—were thus put in as good position, as if their refineries had been situate at Allegheny Junction. They had one uniform through rate on oil from the oil regions to the seaboard.

Parties shipping oil over the Allegheny Valley R. R., received receipts showing the amount of freight paid. When they shipped their oil east, these receipts were accepted by the Pennsylvania R. R. Co., as evidence that the freight chargeable to the first part of the carriage had been paid, and that company collected only its own freight in money. If no such receipts were presented—if no freight had been paid for carriage between Pittsburg and Allegheny Junction—it collected freight for the whole route.

In consequence of this arrangement, the plaintiffs alleged, that refiners of oil at Pittsburg and vicinity were compelled to and did desist from purchasing crude petroleum brought to Pittsburg or its vicinity, by barges or bulk-boats via the Allegheny River, and thus the business of the plaintiffs was almost entirely broken up and destroyed.

The plaintiffs, to counteract the effect of the above-mentioned discrimination, lowered their rates of freight to 8 and 10 cents per barrel—a rate far below that charged by the Allegheny Valley R. R. Co., which was then about 35 cents per barrel—but without avail.

They further alleged that their former customers continued in the business of refining crude oil at Pittsburg and vicinity, and were purchasers of crude petroleum, but that by reason of the above arrangement, they were compelled to withdraw their patronage from plaintiffs, and supply themselves with oil brought via the railroad.

The plaintiffs having closed their testimony, counsel for defendants move the court for judgment of peremptory nonsuit, for the following reasons:

1. No evidence has been given connecting the Pennsylvania R. R. Co., one of the defendants, with the combination declared upon. 2. There is no evidence of any illegal combination for any purpose. There is no evidence of any combination for an illegal purpose, and especially none from which the jury could find a malicious injury "to the plaintiffs in their business." 4. There is no evidence of an unlawful combination between the defendants for the purpose of, and resulting in, "actual legal damages" to the plaintiffs.

The court said: "We do not see how we could sustain a verdict for the plaintiff under the evidence, and, therefore, judgment of nonsuit granted with leave, &c."

This action of the court was assigned for error by plaintiffs, who took this writ.

M. W. Acheson and D. T. Watson, for plaintiffs in error.—The

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fact of conspiracy need not be proved, but may be collected from other circumstances: Com. *v.* Corlies, 3 Brew. 579; and the concurring conduct of the defendants need not be proved: Whar. Crim. Law, sect. 2355; Com. *v.* Warren, 6 Mass. 74; Com. *v.* Crowninshield, 10 Pick. 497. In the King *v.* Parsons et al., 1 W. Bl. 392, it was declared by Lord Mansfield, that there is no occasion to prove the actual fact of conspiracy, but it may be deduced from collateral circumstances. See also Rex *v.* Murphy, 8 C. & P. 297.

Combination is criminal, when the act to be done has a necessary tendency to prejudice the public or oppress individuals: Com. *v.* Carlisle, Brightly Rep. 40; Com. *v.* Tack, 1 Brew. 511; Com. *v.* Kilpatrick, 15 Leg. Int. 347.

Or when the act to be done necessarily tends to prejudice the public or oppress individuals, by unjustly subjecting them to the power of the confederates: Morris Run Coal Co. *v.* Barclay Coal Co., 18 P. F. Smith, 174. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy: Id. 187.

On a railroad, up to its capacity to accommodate, equality must exist at the same rates of transportation, and as far as possible in accommodation: The Cumberland Valley R. R. Co.'s Appeal, 12 P. F. Smith, 218; Twells *v.* Pennsylvania R. R. Co., 3 Am. Law Reg. (N. S.) 728; Sandford *v.* R. R. Co., 12 Harris, 381.

The least degree of concert or collusion between parties to an illegal transaction, makes the act of one the act of all; and the acts and declarations of one may be given in evidence to affect the others: Gibbs *v.* Neely, 7 Watts, 305; Burns *v.* McCabe, 22 P. F. Smith, 315; Confer *v.* McNeal, 24 Id. 112; 1 Greenl. on Ev., sect. 111; Bredin *v.* Bredin, 3 Barr, 81.

The discrimination under this combination in favor of refined oil, the product of crude transported to the Pittsburgh refineries via the Allegheny Valley Railroad, and against refined oil, the product of crude transported to these refineries via the Allegheny river, cannot be justified. It is condemned by the decisions of this court in the cases cited.

The evidence also established indisputably that, in consequence of this combination between the defendant companies, and their united action in carrying out their system of unlawful discrimination, the plaintiffs, respectively, were seriously injured in their business. The disastrous effect upon the plaintiffs was direct and immediate.

Hampton and Dalzell, for defendants in error.—Authority to enter into arrangements and contracts with other connecting carriers, for the purpose of providing through transportation, is an incident of railroad corporations, unless withheld by the terms of their charters: Perkins *v.* P. S. & P. R. R. Co., 47 Me. 573; Old

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Colony R. R. Co. *v.* Evans, 6 Gray, 25. And contracts of this kind, when made with a bona fide purpose to regulate traffic in a reasonable manner, are generally held good: 1 Redfield on Railw. 612; S. W. R. R. *v.* Redmond, 100 E. C. L. R. 674; Darling *v.* Boston and Worcester R. R. Co., 11 Allen, 298; Gass *v.* N. Y., P. & B. R. R. Co., 99 Mass. 220. Contracts between railroad companies for division of fares and freights are legal: Sussex R. R. Co. *v.* Morris and Essex R. R. Co., 4 C. E. Green, 13. The right of railroad corporations to divide through fares and freights on authorized lines, or to offer inducements by a reduction in rates to secure freights and travel over such lines, are contracts concerning their own authorized business, and not objectionable unless unconscionable: M. & E. R. R. Co. *v.* Sussex R. R. Co., 5 C. E. Green, 543. Such contracts are not only not ultra vires, but, on the contrary, it is the duty of a railroad company to increase its business by all usual and customary means: Stewart *v.* Erie and Western R. R. Co., 17 Minn. 390.

Contracts for through rates of freight and travel are not only usual and customary, but they are notoriously consistent with the railway policy of the whole country. They are its basis and the means whereby our railroads, instead of being merely State, have become national highways. Special rates may be made for special shippers, as a class, to secure business: Fitchburg R. R. Co. *v.* Gage et al., 12 Gray, 399; Shipper *v.* Pennsylvania R. R. Co., 11 Wright, 338; Hersh *v.* Northern Central Ry. Co., 24 P. F. Smith, 181.

This arrangement was not oppressive to the public. It cheapened freights, and tended thus to build up the refining business of Pittsburgh. The clearest proof of its beneficial effect is to be found in the fact that every refiner in Pittsburgh availed himself of its terms. Instead of limiting the oil supply in the general market, it increased it. The defendants carried all the year round and without restriction as to quantity; the plaintiff could only carry during a portion of the year, and then only a limited quantity. The defendants are, therefore, within the test laid down by Tindal, C. J., in Horner *v.* Graves, 7 Bing. 735, cited by AGNEW, C. J., in Morris Run Coal Co. *v.* Barclay Coal Co., 18 P. F. Smith, 185. Declarations of one of two persons charged with combining or conspiring to defraud another, are not evidence against the absent party until evidence of the combination for the purpose charged be given: Helser *v.* McGrath, 8 P. F. Smith, 458. To make such declarations competent there must be primary evidence of a collusive combination for a common purpose: McDowell *v.* Rissel, 1 Wright, 164; Scott *v.* Baker, Id. 330; Scott *v.* Heilager, 2 Harris, 238.

And evidence that each one of the alleged conspirators acted illegally, will not support the action without evidence that they

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conspired to do the illegal act: Newall *v.* Jenkins, 2 Casey, 159; Gaunce *v.* Backhouse et al., 1 Wright, 350.

MERCUR, J.—These two cases were argued together. They involve the same questions. The court below ordered a compulsory nonsuit in each case, and refused to take off the judgments.

They are actions on the case against the defendants for conspiracy and injury to the plaintiffs respectively, in their business. The latter were engaged in the transportation of crude oil, in boats and barges down the Allegheny river, from the oil regions of Pennsylvania to Pittsburg. The Allegheny Valley R. R. Co. was engaged in transporting it by rail. The crude oil was brought to Pittsburgh by both modes, principally for the purpose of being there refined, and then sent to the seaboard for market. Competition was thus created. The railroad company had some advantages over the bargemen. At some seasons of the year there was an insufficiency of water in the river, at others it was frozen. The railroad could carry at all times. At first the crude oil was carried in barrels. As the quantity largely increased, tanks were substituted. This made transportation by railroad more desirable, and gave it an additional advantage.

The cause of complaint is, that the Allegheny Valley R. R. Co. entered into an arrangement with the Pennsylvania R. R. Co., the effect of which was to take from the plaintiffs that transportation of oil which they otherwise would have obtained. It is not complained that the price of freight from Pittsburgh east was increased by this arrangement, nor that the public in any manner suffered thereby.

Each party had an undoubted right to enter into a just and fair arrangement with a corporation or association of men, whereby its business should be increased, although the effect of the arrangement may have been to take business from the other. Either party, with a view of increasing its business, may extend more favorable terms to all shippers, although others engaged in the same business may incidentally be injured thereby. The fact that the public patronize those lines of transportation which give the most favorable terms, constitutes no just ground of complaint. What then are the facts? It is shown that each party carried crude oil from any point at which it was taken, to Pittsburgh and its vicinity, at one rate, without regard to the distance; and that refiners had a uniform through rate for refined oil to the seaboard via Allegheny Valley and Pennsylvania Railroads from any given point where the crude oil first reached the former road. The Allegheny Valley Road crosses the Western Pennsylvania Railroad at Allegheny Junction, and by means of the latter road connects with the main line of the Pennsylvania Railroad In order to more successfully compete with the river transportation, the Allegheny Valley Road carried crude oil to the

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refinery at Pittsburgh, and its manufactured product to Allegheny Junction at one uniform rate, thus giving to all the refiners at Pittsburgh as favorable terms as if their refineries had been located at Allegheny Junction. They had one uniform rate on oil from the oil regions to the seaboard. We are unable to discover anything unjust or unfair in this. To deny this right to the Allegheny Valley Road would be an unwarranted interference with the management of its business, and would deprive the public of the benefit of the competition to which it is justly entitled.

Then as to the action of the Pennsylvania R. R. Co., in the transportation of refined oil from Pittsburgh east. It was carried over the road of each company. Each was entitled to and received its share of the money thus earned. The fact that it was first all paid to one and afterwards adjusted between them, gives the plaintiffs no right to complain. These two companies had the right either for their own convenience or for the convenience of the refiners and shippers to require the whole freight on refined oil to be paid to the one that first carried it. The right of connecting railroad corporations to make contracts for through rates, is incident to their powers unless prohibited by their charters. 1 Redf. on Rys, sec. 146: Perkins *v.* P. S. & P. R. R. Co., 47 Maine, 573; Sussex R. R. Co. *v.* Morris & Essex R. R. Co., 4 C. E. Green, 13; M. & E. R. R. Co. *v.* Sussex R. R. Co., 5 Id. 543. In the present case the right was not prohibited. It was exercised in a just and reasonable manner. It was not unconscionable. The Pennsylvania R. R. Co. carried refined oil at no different rate, whether it was the product of crude oil brought to Pittsburgh by rail or by water. The same rate was charged to each. The mode of receiving its pay was different. That carried by water paid in money only; that by rail partly in receipts showing money already paid. This was no rebate. It was no unjust discrimination. Neither company received any share of the other's earnings. Each received its own. We see nothing unjust or unequitable in the arrangement proved on the part of either of the defendants. It is not a restraint on trade, as in Morris Coal Co. *v.* Barclay Coal Co., 18 P. F. Smith, 173; nor does it come within the principle condemned in Twells *v.* Penn. R. R. Co., 3 Am. Law Reg. (N. S.) 728. If the plaintiffs suffered thereby it is an incident often occurring to persons engaged in transportation, as new modes are adopted and reduced rates thereby established. Neither corporations nor individuals ought to be denied all reasonable benefits which flow from the active competition of trade.

Having the right to adopt rates lower than crude oil could be carried in barges, the fact that the president of the railroad company expressed an intention of driving all the business away from the barges, cannot change the case. His object was to secure freight for his road. The fact that he foresaw the result of his

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efforts in so doing, and also declared it, matters not. Neither he nor the company which he represented was thereby compelled to relax all just and reasonable methods to increase the business of the road. It is unnecessary to refer specifically to other matters discussed. In view of the whole evidence, and the questions of law arising thereon, the learned judge committed no error.

Judgment affirmed in each case.

A railroad company, being created by the government for public purposes, owes a certain measure of duty to the public. Within this measure of duty is included the obligation to treat the public with equality and fairness. It cannot be presumed that it was the legislative intent to vest in the company the power to carry one man's goods at one rate and another's at another rate. The doctrine of the common law appears clearly to be that all undue and unreasonable discriminations of this character are illegal. In order to make this clear beyond all peradventure, general statutes have from time to time been passed in England to this effect, and clauses of the same purport are usually inserted into English railway charters. These legislative provisions are, however, merely declaratory of the common law. See Rockford v. G. J. R. Co., 10 M. & W. 399; Parker v. G. W. R. Co., 7 M. & G. 253; Crouch v. L. & N. W. R. R. Co., 2 C. & K. 789; Parker v. G. N. R. Co., 11 C. B. 545; Edwards v. G. W. R. Co., 11 C. B. 588; Crouch v. G. N. R. Co., 9 W. H. & G. 556; Finnie v. G. & S. W. R. Co., 2 McQ. H. L. Cas. 177; Crouch v. G. N. R., 11 H. & G. 742; Barker v. M. R., 18 C. B. 46; Caterham R. Co. v. L. B. & S. C. R. Co., 1 C. B. (N. S.) 410; Barret v. G. N. R. Co., id. 423; Ransome v. E. C. R. Co., id. 437; Oxlade v. N. E. R. Co., id. 454; Marriott v. L. & S. W. R. Co., id. 499; Beadell v. E. C. R. Co., 2 C. B. (N. S.) 509; Painter v. L. B. & S. C. R. Co., id. 702; Baxendale v. N. D. R. Co., 3 C. B. (N. S.) 324; Harris v. C. & W. R. Co., id, 693; Jones v. E. C. R. Co., id. 718; Baxendale v. E. C. R. Co., 4 C. B. (N. S.) 63; Ransome v. E. C. R. Co., id. 135; Cooper v. L. & S. W. R. Co., id. 738; Piddington v. S. E. R. Co., 5 C. B. (N. S.) 11; Baxendale v. G. W. R. Co., id. 309, id. 336; Nicholson v. G. W. R. Co., id. 366; Garton v. B. & E. R. R. Co., 6 C. B. (N. S.) 639; Bennett v. M. S. & L. R. Co., id. 707; Nicholson v. G. W. R. Co., 7 C. B. (N. S.) 755; Ransome v. E. C. R. Co., 8 C. B. (N. S.) 709; Garton v. B. & E. R. Co., 1 B. & S., 112; Baxendale v. B. & E. R. Co., 11 C. B. (N. S.) 787; S. C., 12 C. B. (N. S.) 63; S. C., id. 78; S. C., 14 C. B. (N. S.) 1; S. C., 16 C. B. (N. S.) 137; S. C., L. R., 1 Exch. 137; Branley v. S. E. R. Co., 12 C. B. (N. S.) 63; Sutton v. G. W. R. Co., 3 H. & C. 800; Palmer v. L. & S. W. R. Co., L. R., 6 C. P. 194; West v. L. & N. W. R. Co., L. R., 5 C. P. 622; Parkinson v. G. W. R. Co., L. R., 6 C. P. 554.

In America such statutory provisions are not so common, but the common law rule is just as definitely established. N. E. Express Co. v. M. C. R. Co., 57 Me. 188; Sandford v. R. R. Co., 24 Pa. St. 378; C. & B. Q. R. R. Co. v. Parks, 18 Ill. 460; Fitchburg R. R. Co. v. Gray, 12 Gray, 393; Sargent v. Boston & L. R. Co., 115 Mass. 416; McDuffie v. Portland R. R. Co., 52 N. H. 430.

But this rule, being founded on dictates of public policy, is not to be so construed as to interfere with public interests, or to prohibit any reasonable arrangement which may be made by a railroad company as regards its rates for freight, so as to facilitate or increase its business. A railroad company may, therefore, unless expressly prohibited by statute, charge less rates for through transportation than for local traffic. Shipper v. Penna. R. R. Co., 47 Penn. St. 338; Stewart v. Erie & W. Trans. Co., 17 Minn. 372; and may agree to charge less freight of a constant shipper of goods in large quantities than of an infrequent shipper of small amounts. See the English cases

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already cited. But in these cases the company has been generally obliged to show that the discrimination was founded either upon an immediate benefit to them in the reduction of an average cost of transportation or a resulting benefit by reason of the increase in the amount of goods carried. Crouch v. R. R. Co., 2 C. & K. 789; Parker v. G. W. R. Co., 11 C. B. 545; Pickford v. Grand Junction R., 10 M. & W. 399; Baxendale v. G. W. R. Co., 94 E. C. L. R., 809; Pidington v. S. E. R. Co., 94 E. C. L. R. 111; Garton v. R. Co., 101 E. C. L. R. 112.

If the company cannot prove this they cannot justify the discrimination. It was held, accordingly, in Twells v. Penna. R. R. Co., 3 Am. L. Reg. (N. S.) 728, that a company could not justify a discrimination in its charges in favor of those shippers who forward their goods by a certain road beyond the terminus of the company's road. This would seem to be clearly right.

The question here raised was a very different one. The discrimination complained of clearly threw business into the companies' hands, and was not therefore illegal.

That both companies had the power to enter into a contract of this kind cannot be doubted. It was incidental to their chartered rights, to be inferred from the grant of their franchises. Buffett v. Troy R. R. Co., 40 N. Y. 168; Parish v. Wheeler, 22 N. Y. 494; Field on Corp. 509. See also the cases cited in the opinion.

That the contract was not within the prohibition of Morris Coal Co. v. Barclay Coal Co. (68 Penna. St. 173) is very evident. The rule there laid down is that any combination between corporations producing an injurious effect on the public, as by raising artificially the price of some commodity required for public consumption, is illegal and void. Oregon Steam Nav. Co. v. Winsor, 20 Wallace, 64; Maguire v. Smock, 42 Ind. 1; Bowen v. Matheson, 14 Allen, 99; Carew v. Rutherford, 106 Mass. 1; Gale v. Kalamazoo, 23 Mich. 344; Sampson v. Shaw, 101 Mass. 145; Crawford v. Wick, 18 Ohio (N. S.) 190.

In the present case, however, the agreement in question was not open to this objection. To the public at large it was, on the contrary, rather beneficial than hurtful, since the rate of through freights from the oil region to the eastern market was by it sensibly diminished.

The Union R. R. Transfer and Stock Yard Co.

v.

John Moore.

(*Advance Case, Indiana. January* 26, 1882.)

The Panhandle and Junction railroads crossed Moore's land, side by side, in a straight line, nearly east and west, on a right of way 100 feet wide, which they had bought and paid for; these roads went between Moore's house on the north and his barn on the south; within 100 feet of each of these buildings the right of way extends; a lane led into the public highway, which lane ran north and south, between the house on the west and the barn on the east; and the right of way of the two railroads crossed this lane between the house on the north and the barn on the south. The ground appropriated for its main line by the Union R. R. Transfer and Stock Yard Co. was a strip seventy-five feet wide along all the east line of Moore's land; the house

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and barn stood nearly midway between the east and west line of his land and 700 feet west of such appropriation, which ran nearly north and south, crossing the Panhandle and Junction roads at nearly right angles. The switch began at the main line 700 feet south of the Panhandle and Junction roads and crossed Moore's land, crossing north-westwardly, and joins the right of way of the other two roads fifty feet east of the lane. The court, among other things, instructed the jury that "the condition of the Junction and Panhandle roads at the date of appropriation can only be considered in estimating the value of the ingress and egress upon the east of Moore's land to and from the residue not appropriated by the Belt (Union R. R. Transfer and Stock Yard) road." *Held*, error.

Proof at what other land than that appropriated, but in the same neighborhood, could be bought for is inadmissible.

Where improper evidence is admitted the presumption, on appeal, is that it misled the jury; and such error is sufficient to reverse the case unless the contrary clearly appears.

Proof was held admissible to show that the effect of the Union R. R. Transfer and Stock Yard Co. crossing the other two railroads was to cause the cars of the two last roads to blockade Moore's ingress and egress to his property.

The value of the land appropriated to be proven in the cash value.

If a witness for the railroad is asked on cross-examination what he had sold land for in the neighborhood of the land appropriated and answers it, he may on re-examination be asked if he had not also sold other land than that referred to on cross-examination at a much lower rate per acre.

The court may limit the number of witnesses to testify on either side of the case.

THE opinion of the court was delivered by BICKNELL, COMMISSIONER:

Claypool and Ketchum, for appellee.

Samme Roach, and Harrison, Hines & Miller, for appellant.

BICKNELL, C.—The appellant appropriated land of the appellee for the use of its railroad; damages were assessed in favor of the appellee at four thousand dollars; and he appealed to the superior court of Marion county alleging inadequate damages.

A change of venue was taken to the Johnson circuit court, where a jury gave the appellee $7000.

The appellants' motion for a new trial was overruled, judgment rendered upon the verdict, and the appeal was taken.

The only error assigned is the overruling of the motion for a new trial; the only reasons for a new trial discussed in the appellants' brief are, 1. Error in the ninth instruction; 2. Error in admitting certain testimony of William Hadley; 3. Error in admitting certain testimony of Thomas Goodwin; 4. Error in admitting certain testimony of John Moore, Peter Kealing and David Brower; 5. Error in admitting certain testimony of William C. Smock; 6. Error in admitting certain testimony of John S. Spann, and in excluding other testimony of said Spann; 7. Error in refusing to require the jury to answer interrogatories; 8. Error in

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refusing to permit more than eleven witnesses to be examined on each side.

It appeared in evidence that the Panhandle and Junction railroads cross the appellee's land side by side, in a straight line, nearly east and west, on a right of way about one hundred feet wide, which they bought and paid for, and had been using constantly for fifteen years. These roads go between the appellee's house on the north, and his barn on the south; within one hundred feet of each of these buildings the right of way extends. There is a lane leading into the national road, which lane runs north and south, between the appellee's house on the west and his barn on the east; and the right of way of said two railroads crosses this lane between said house on the north and said barn on the south.

The ground appropriated by the appellant for its main line is a strip seventy-five feet wide along all the east line of appellee's land; said house and barn stand nearly midway between the east and west lines of appellee's land,—somewhat nearer to the west line,—and upwards of 700 feet west of appellant's appropriation for its main line, which runs nearly north and south, crossing the Panhandle and Junction roads nearly at a right angle.

The ground appropriated by the appellant for its switch begins at its main line, about 700 feet south of the Panhandle and Junction roads, and crosses appellee's land, curving north-westerly, and joins the right of way of the other two roads about fifty feet east of the lane aforesaid. Appellee's land had been used as a farm. His west line is two and a half miles east of the court-house, in Indianapolis, and the claim was that the land was of special value for suburban residences. East of appellants' main line, and south of the Panhandle and Junction roads, is a little place called Stratford, having four or five houses.

The appellants' road is generally called the "Belt Road."

The 9th instruction was as follows: "As I have suggested, you cannot allow Moore any future or contingent value, that is, in prospect, for his land; yet it is proper, in assessing the damages of Moore upon the lands not appropriated, to consider the effect of the future occupation and use of the lands appropriated by the railroad company upon the residue of the land, considered with reference to its condition, value, location, and surroundings at the date of the appropriation."

It is proper to consider the condition of such land with reference to Stratford on the east, the public highway upon the north and south, the cutting of the land by the Panhandle and Junction railroads, and all the means of ingress and egress of said Moore to and from his lands at the date of the appropriation, together with all other elements of convenience and inconvenience surrounding Moore's land, to assist you in determining the damage to the resi-

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due of Moore's land not appropriated by the Belt R. R. Co., at the date of the appropriation."

The appellants' counsel concedes that thus far the 9th instruction is unobjectionable; but he claims that the concluding paragraph, in the following language, was wrong: "But the condition of the Junction and Panhandle roads at the date of the appropriation can only be considered in estimating the value of the ingress and egress upon the east of Moore's land, to and from the residue not appropriated by the Belt road."

Upon this it seems clear that whether the land had special value as a site for suburban residences or not, if there were two railroads already there, crossing the plaintiff's land as hereinbefore described, and the Belt road was to be near them, crossing both of them on plaintiff's land, and joining one of them with its switch near the plaintiff's barn, then in estimating the effect of the new road upon the value of land so situated the existing condition and operation of the two roads already there ought to be considered in estimating the value of the land taken by the new road, and also the value of the remaining land; and it was error, and had a tendency to mislead the jury, to tell them that the condition of the existing roads could be considered only in reference to the ingress and egress upon the east side of said land.

William Hadley, a witness for the appellee, had testified that Moore's land was worth $600 per acre for the entire farm; on cross-examination said it could not have been sold for more than $200 per acre. He was then asked on cross-examination if he knew of any sales in that neighborhood at that rate, and he answered no.

Upon re-examination the counsel for the appellee, over the objection of the appellant, was permitted to ask the witness and the witness to answer the following question: "State whether or not any land could have been bought in that neighborhood at less than $500 an acre in July, 1877." This was not a proper question. The matter under investigation was the value of Moore's land. What other land could be bought for might depend upon a great many circumstances not affecting the appellee's land. The fact that an owner of land will not sell for less than a given price is no evidence of its value. He may not wish to sell it at all; and the opinion of the witness that the land in that neighborhood could not be bought for less than $500 an acre was either a merely speculative opinion or, if founded on the information of others, it was hearsay. When such evidence is improperly admitted, the presumption is that it misleads the triers of the fact, unless the contrary clearly appears. King *v.* Enterprise Ins. Co., 45 Ind. 43; Wiseman *v.* Wiseman, 73 Ind. 112.

Thomas Goodwin was permitted, over the objection of the appellant, to state that "since the finishing of the Belt road this part

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of the road where it joins on is almost constantly obstructed by locomotives, cars and smoke;" and this witness was permitted, over the like objection, to answer fully as to the obstructions upon the Panhandle and Junction roads between plaintiff's house and barn. The objection made to this testimony is that these two roads had bought their right of way, and were entitled to use it themselves, and to permit other companies to use it, as fully as they pleased; and that such increased use could not be an element of damage in this case. But the testimony of Goodwin was competent, as tending to show the value of land already subject to such inconveniences; and also to aid the jury in determining the value of the ingress and egress to and from Moore's land on the east side. There was no error in admitting this testimony of Goodwin.

The witnesses John Moore, Peter Kealing and David Brouse were asked if they knew the value of the land in controversy? The appellant objected to the form of the question. He now claims that the question in such case ought to be, "as to the market cash value." It is not necessary that the witness should be asked; it is enough to ask him if he knows the value of the land. The value in such question means the cash value. If the witness in his answer intends anything else it can be shown upon cross-examination. But the general question, What is the value of the land per acre? means what is the cash value per acre. There was no error in this respect.

The appellant objected also to the following question, put by the appellee to John S. Spann: "How rapid has been the increase in the price of land lying around and within two or three miles of the centre of the city during the last fifteen years?" This question was put upon cross-examination. Spann was a witness for appellant. He had testified generally as to the demand for land about Indianapolis since the panic in 1873; and that the intrinsic value of Moore's land was $250 to $300 per acre; that the damage to it by the construction of the Belt road was $1000. We think the question did not go beyond the reasonable limits of a cross-examination, and that there was no error in overruling the objection to it.

In cross-examination this witness was asked by the appellee, whether within the past two years he had not sold a piece of land, about 4½ miles from Indianapolis, for $300 an acre? He replied he had. Then, on re-examination, the appellant asked him whether he had not sold another tract, adjoining the former, and as good as the former, for $125. This question was objected to by the appellee and was excluded by the court. The witness having been permitted to answer the question as to the sale of land in another locality for $300 an acre, we think he ought to have been permitted to answer the question as to a sale of adjoining land at $125 an acre. If there was any relevancy in the first question, there was as much in the second.

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The argument of the case began on the 27th of September and ended on September 28th. The court on the former of these days notified the counsel that "all instructions" must be handed to the court by ten o'clock, P. M., of that day. After the conclusion of the argument the appellants' counsel requested the court to instruct the jury, if they should render a general verdict, to find specially upon particular questions of fact, then submitted to the court, to be put to the jury. See Practice Act, Sec. 336.

The bill of exceptions shows that the court refused to submit said questions to the jury, "because they were not submitted in time to be properly considered by the court, and for not complying with the order of the court heretofore made," etc.

There is no error in refusing to submit interrogatories to a jury when they are presented after the commencement of the argument. Glasgow *v.* Hubbs, 52 Ind. 339. A fortiori, there is no error in refusing to submit them when presented after the conclusion of the argument. The court below must decide whether an interrogatory is "relevant, properly framed, and presented in due time." Nichols *v.* The State ex rel., 65 Ind. 512. There is no error in the action of the court in this matter.

Before any witness had been examined the court notified the parties that no more than eleven witnesses on each side should be examined as to the value of the property in controversy, or the injury to plaintiff Moore's farm by reason of the location and construction of the defendant's road. To this announcement the appellants' counsel at the time excepted, and after examining the eleven witnesses allowed by the court offered to examine two other witnesses, and to prove by them the value of plaintiff's land and his damages by the location and construction of the plaintiff's road.

The court refused to hear any more witnesses. There was no error in this. It was a matter within the discretion of the court, and the record shows no abuse of that discretion. Gardner *v.* The State, 4 Ind. 633. In Hubble *v.* Osborn, 31 Ind. 249, it was held to be an abuse of discretion to limit a party to one witness on the vital point of his case; but in a case of this kind there was no abuse of discretion on notifying the parties of the proposed limitation of the number of witnesses; and there is nothing in the record which shows abuse of discretion in the subsequent refusal of the court to hear two more witnesses for the appellant upon the points upon which eleven witnesses had already been examined on each side. It required a plain case of abuse to justify the reversal of a cause for a matter depending upon discretion. Morris *v.* Graves, 2 Ind. 354; Mulhollin *v.* The State of Ind., 646; Trees *v.* Eakin, 9 Ind. 554; Coats *v.* Gregory, 10 Ind. 345.

The motion for a new trial ought to have been sustained on account of the errors hereinbefore pointed out in the 9th instruction,

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and in the admission of part of Hadley's testimony and in the exclusion of the question put by the appellant to John S. Spann. For the error in overruling said motion, the judgment of the court below ought to be reversed.

Per CURIAM.

It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

For the land taken or injured the owner is to receive compensation. What that compensation is to be the circumstances of each particular case must of course determine. But it is in all cases to be a just compensation—the actual value of the land taken or the actual injury done; that is, what disinterested third parties would pay for the land taken or injured under the various conditions in which the question of value may arise. "In making reprisals of this kind the true rule, the only rule which will do equal justice to all parties, is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth after the improvement is made." Troy & Boston R. R. Co. v. Lee, 13 Barb. 169; Union Village, etc., R. R. Co., 58 Barb. 457; S. C., 35 How. Pr. 420; People v. Mayor, 2 Hun, 433; Hyde Park v. Dunham, 85 Ill. 569.

The value the owner of the property taken places upon it cannot be considered as the true basis of damages. In the Matter of Furman Street, 17 Wend. 649.

The damages are not confined to the actual value of the land taken, but also to consider how the taking of the land would affect that not taken. Albany Northern R. R. Co. v. Lansing, 16 Barb. 68. "What was the fair market value of the whole property, and then what would be the fair marketable value of the property not taken? The difference would give the true amount of compensation to be awarded." Canandaigua & Niagara Falls R. R. Co. v. Payne, 16 Barb. 273; Black River, etc., R. R. Co. v. Barnard, 9 Hun, 104; Rochester, etc., R. R. Co. v. Budloy, 6 How. Pr. 467; Delaware, etc., R. R. Co. v. Burson, 61 Pa. St. 369; Thornburn's Case, 7 S. & R. 411; Harvey's Case, 11 Wright, 424; Pittsburg, etc., R. R. Co. v. Rose, 74 Pa. St. 362; Searle v. Lackawanna, etc., R. R. Co., 9 Casey, 57; East Pa. R. R. Co. v. Hiester, 4 Wright, 53; Gidener v. Essex, 22 Ind. 201; Chicago, etc., R. R. Co. v. Francis, 70 Ill. 238; Page v. Chicago, etc., R. R. Co., 70 Ill. 324; Eberhart v. Chicago, etc., R. R. Co., Id. 347.

For many years two tracks of a railroad ran diagonally across a street in front of a lot of one Judge, upon which stood his grocery store and dwelling-house. In 1874 the railroad company laid two additional tracks in the street, bringing them a few feet nearer Judge's building. Judge offered to prove that such additional occupation brought heavily laden cars near his building and jarred the walls so seriously as to require repairs to the extent of $1000 a year; that the portion of the tract not taken had depreciated in value by the noise, smoke and increased danger, and that such remaining portion would, in the future, be depreciated in value by the running of cars over the new tracks. *Held*, that such evidence should have been admitted. In re N. Y. C. & H. R. R. R. Co., 15 Hun, 63; Henderson v. N. Y. Cent. R. R. Co., 17 Hun, 344. Evidence that it is more difficult for the land owner to rent his property is admissible in assessing damages for the construction of the road. Pittsburg, etc., R. R. Co. v. Rose, 74 Pa. St. 362. If the land has a mine under its surface that fact may be considered, if the location of the road there will

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add to the land's value. Hoslorn *v.* Galena, etc., R. R. Co., 64 Ill. 353. Where part of the plaintiff's sea wall was appropriated, but the wall served its former use, it was held that the measure of damages was what would make the plaintiff whole for the occupation of the wall, and not what the wall cost. This might be more or less than the actual damages. Gear *v.* C. C. & D. R. R. Co., 39 Iowa, 23.

Where a railroad cut through another railroad's embankment it was held that the measure of damages was the cost of building a bridge and keeping it in repair. Chicago & Alton R. R. Co. *v.* N. W. R. R. Co., 67 Ill. 142. The value of the house as such, and not the value of the materials, should be given. Lafayette and B. R. R. Co. *v.* Winslow, 66 Ill. 219. No damages can be given for the improper construction of the road for which the land is taken, as these do not result from the taking. King *v.* Midland R. R. Co., 34 Iowa, 458. The damages for the relocation of a road are the difference between the damages for the former location and the present one, taking into consideration the fact that the old road is given up. If the former was greater than the latter, nothing can be given. Jewett *v.* Israel, 35 Iowa, 261. Only the value of the land at the taking can be recovered, although the city authorities may have induced the plaintiff to expend money and work thereon after such taking. Cobb *v.* Boston, 109 Mass. 438. If the owner testify in his own behalf on cross-examination he may be asked what he paid for the land. Id. The good-will is no part of a tenant's lease and cannot be made a subject of inquiry as constituting part of its value. Id.; Edmunds *v.* Boston, 108 Mass. 535. The water commissioners of the city of Providence determined to make a public improvement,—to wit, a reservoir,—and took certain land for that purpose, but none belonging to the complainants. After location of said improvement they decided to take more land, namely, that of the complainant's now in question. *Held*, that the value of complainant's land was to be estimated as it was at the time it was condemned, and not at the time of the location of the improvement. Stafford *v.* Providence, 10 R. I. 567. In assessing the benefits to church property it is proper, so held, to consider the peculiar uses to which it will be put, and the qualified power of disposition over it. Other dangerous building which, from its use, will be removed, is a proper matter to be considered in estimating benefits. People *v.* Howlet, 63 N. Y. 291. The value of the lot taken must be considered. If the remainder of the lot is rendered less valuable by reason of being severed or disfigured on account of the strip taken and the use made of it, such a sum may be allowed as will cover the injury; and in determining the consequent depreciation of the lot the use may be considered to which the strip taken is appropriated; the character, situation, present and probable use of the remainder of the lot, and the distance of the owner's buildings from the location of the railroad. Bangor, etc., R. R. Co. *v.* McComb, 60 Me. 290. Interest may be allowed on the damages found, after the time when the land is taken by the corporation and up to the time of suit. Id.; Reed *v.* Hanover B. R. R. Co., 105 Mass. 303. No personal inconvenience not connected with the lands can be the subject of compensation. Bird *v.* Great Eastern R. R. Co., 34 L. J. C. P. 366; Rickets *v.* Metropolitan R. R. Co., 34 L. J. Q. B. 257. If the danger of the use of a railroad is greater than from its use as a highway that may be considered. Curtis *v.* St. Paul R. R. Co., 29 Minn. 28.

The jury may take into consideration the deterioration in value of the adjacent parts of the same tract by the proximity of the railroad, either for agricultural purposes or for sale as building lots, the increased risk of and increased care required for family and stock, the risk of fire, the inconvenience caused by embankments and excavations, and the obstruction to the free use of the buildings. Somerville, etc., R. R. Co. *v.* Doughty, 2 Zab. 495.

Inconvenience in opening gates and bars to cross the railroad may be considered. Minnesota R. R. *v.* Doran, 17 Minn. 180. Also crossing one part

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of an establishment to another over such road. Sherwood v. St. Paul R. R. Co., 21 Minn. 122; Winona R. R. Co. v. Waldron, 11 Minn. 515. So inconveniences from the sounding of whistles, ringing of bells, jarring of the ground, or rattling of trains. White v. Charlotte R. R. Co., 6 Rich. L. (S. C.) 47; Bangor R. R. Co. v. McComb, 60 Me. 290. So inconvenience or annoyance from the leaking of a canal. James River Co. v. Turner, 9 Leigh, 313. So from new fences. Danville R. R. Co. v. Gearhart, 32 Leg. Int. (Pa.) 219; Whitewater R. R. Co. v. McClure, 29 Ind. 536. Or from cuts or ditches. Atchison R. R. Co. v. Blackshire, 10 Kan. 477. Or from embankments. Pittsburg R. R. Co. v. Rose, 74 Pa. St. 362. Or liability, it is said, of stock to be killed. St. Louis R. R. Co. v. Teten, 68 Ill. 154; Wilson v. Rockford R. R. Co., 59 Ill. 270.

Consequential or speculative damages must be rejected. Hornstein v. Atlantic, etc., R. R. Co., 51 Pa. St. 87; Page v. Chicago, etc., R. R. Co., 70 Ill. 324; Hyde Park v. Dunham, 85 Ill. 569.

Any mere general and public benefit or increase of value received by the land, in common with other lands in the neighborhood, is not to be taken into consideration. Page v. Chicago, etc., R. R. Co., 70 Ill. 324; Mix v. Lafayette, etc., R. R. Co., 67 Ill. 319; Chicago, etc., R. R. Co. v. Hall, 90 Ill. 42; Bangor R. R. Co. v McComb, 60 Me. 290; Adden v. White Mountain R. R. Co., 55 N. H. 413.

The damages may be shown by a comparison of the sales of other property similarly situated before and after the construction of the road; or by the difference in its rental value, if held for the purpose of renting; but if not held for that purpose, then the difference in rental value would not be a criterion. St. Louis, etc., R. R. Co. v. Halley, 82 Ill. 208.

In Robb v. M. & Mt. Sterling S. T. R. Co., 3 Met. (Ky.) 117, the peculiar value of the land to the owner was taken as the measure of damages. This case cannot be regarded as correctly decided.

The apprehension of fires may be considered, notwithstanding the railroad is responsible for all damages, whether resulting from negligence or not. Pierce v. Worcester R. R. Co., 105 Mass. 199; Bangor R. R. Co. v. McComb, 60 Me. 290; Keithsbury R. R. Co. v. Henry, 79 Ill. 290; Sommerville R. R. Co. v. Doughty, 2 Zab. 495; Adden v. White Mountain R. R. Co., 55 N. H. 413. The value of a building for the purpose of residence, or business, or sale is diminished by the effect of a constant liability to fire, on account of proximity to a railroad. Matter of Utica R. R. Co., 56 Barb. 456; Pierce v. Worcester R. R. Co., 105 Mass. 199; Wilmington R. R Co. v. Stauffer, 60 Pa. St. 374; Oregon R. R. Co. v. Barlow, 3 Oreg. 311. If this is such as to render it necessary to remove the building the cost of such removal may be considered. Oregon R. R. Co. v. Barlow, 3 Oreg. 311. Such danger must be real and imminent, and will not be considered if the buildings are at a distance. Jones v. Chicago R. R. Co., 68 Ill. 380; Hatch v. Cincinnati R. R. Co., 18 Ohio St. 92; St. Louis v. Teters, 68 Ill. 144; Proprietors of Locks and Canals v. Nashua, etc., R. R. Co., 10 Cush. 385. The increase of the cost of insurance may be given in evidence, and the fact that an insurance company has refused to take the risk may also be given in evidence. Webber v. Eastern R. R. Co., 2 Metc. 147.

This doctrine of allowing damages on account of the increased risk of fires has been denied in several States. Lehigh Valley R. R. Co. v. Lazann, 23 Pa. St. 203; Patten v. Northern Cent. R. R. Co., 33 Id. 426; Sunbury v. Hummell, 27 Id. 99; Rodemacher v. Milwaukee R. R. Co., 41 Iowa, 297.

The market value of the land at the taking may be given in evidence. Cobb v. Boston, 112 Mass. 181. This means not what the land would bring at a forced sale, but what it would bring in the hands of a prudent seller at liberty to fix time and conditions of sale. Somerville, etc., R. R. Co. v. Doughty, 2 Zab. 495; Patterson v. Boom Co., 3 Dill. 465; Lawrence v. Bos-

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ton, 119 Mass. 126; Memphis v. Bolton, 9 Heisk. 508. It is not proper to consider what one would give rather than be turned out of the property. Tufts v. Charlestown, 4 Gray, 537; or what was given as a compromise price by the public, when there could be no other purchaser, and the seller had the option of selling or awaiting condemnation proceedings to assess the price. Cobb v. Boston, 112 Mass. 181; Fall River Works v. Fall River, 110 Mass. 428; Howard v. Providence, 6 R. I. 514. The fact that overtures looking to a compromise had been made, and an offer made, cannot be given in evidence. Davis v. Charles River R. R. Co., 11 Cush. 506. It is not proper to add to the value because the land was indispensable to the railroad. Virginia R. R. Co. v. Elliott, 5 Nev. 358; Penny v. Penny, 37 L. J. (Ch.) 340.

The value of land rests merely in opinion. Persons acquainted with the land may state their opinion, although not necessarily experts. Shettuck v. Stoneham, etc., R. R. Co., 6 Allen, 115; West Newbury v. Chase, 5 Gray, 421; Walker v. Boston, 8 Cush. 279; Swan v. Middlesex, 101 Mass. 173; Whitman v. Boston, etc., R. R. Co., 7 Allen, 313; Wyman v. Lexington, etc., R. R. Co., 13 Metc. 313. The value of their testimony may be shown on cross-examination. Snow v. Boston, etc., R. R. Co., 65 Me. 230; Dwight v. Hawkden, 11 Cush. 201; Simmons v. St. Paul, etc., R. R. Co., 18 Minn. 184; Pennsylvania R. R. Co. v. Bunnell, 81 Pa. St. 414; Illinois, etc., R. R. Co. v. Horn, 18 Ill. 257; Lafayette and B. R. R. Co. v. Winslow, 66 Ill. 219.

The price which the owner gave may be put in evidence, and the owner may show under what circumstances he purchased it, and the value of the improvements he put upon it. Swan v. Middlesex, 101 Mass. 177; Sexton v. New Bridgewater, 116 Mass. 200; Dickenson v. Fitchburg, 13 Gray, 546.

The value of the land would not include the price of coal or minerals in the land, because that would necessitate an inquiry into the cost of raising it; and hence, what would be given for the land with the coal in it is the only rule. Searle v. Lackawanna R. R. Co., 33 Pa. St. 57. Nor can it be asked what is the average annual net profits of the stock taken, because the profits vary with the cost of labor. Stockton, etc., R. R. Co. v. Galgiani, 49 Cal. 139.

Witnesses must testify as to the value of the property before and after the improvement, but not as to the effect of the change in adding to, or taking from, such value. Prosser v. Wapello Co., 18 Iowa, 327; Gates v. Burlington, etc., R. R. Co., 1 Iowa, 386; Dalzell v. Davenport, 13 Iowa, 437; Atlantic, etc., R. R. Co. v. Campbell, 14 Ohio St. 483; Tingley v. Providence, 8 R. I. 493; Rockford, etc., R. R. Co. v. McKinley, 64 Ill. 338; Hosher v. Kansas City, etc., R. R. Co., 60 Mo. 329. A witness cannot be asked the value of the land with a strip taken out. Logansport v. McMillen, 49 Ind. 493. A witness may be asked how much the land is worth, and how much it will be worth after the road is built. Brainard v. Boston, etc., R.R. Co., 12 Gray, 407; Pittsburg, etc., R. R. Co. v. Rose, 74 Pa. St. 362; Eberhart v. Chicago, etc., R. R. Co., 70 Ill. 347. The witness may state the reasons why he thinks the land will be less in value. Parks v. Wisconsin, etc., R. R. Co., 33 Wis. 413. Opinions as to the amount of damages may be given by experts. White Deer. Creek Co. v. Sassaman, 67 Pa. St. 415; Lehmicke v. St. Paul, etc., R. R. Co., 19 Minn. 464; East Pennsylvania R. R. Co. v. Holtenstine, 47 Pa. St. 28; Stein v. Burden, 24 Ala. 130; Swan v. Middlesex, 101 Mass. 173; Kerthsburg, etc., R. R. Co. v. Henry, 79 Ill. 290.

In many States consequential damages are provided for by statute, or by the constitution. In such cases the owner of property injured, though not taken, is entitled to compensation. Brown v. Providence, etc., R. R. Co., 5 Gray, 35; Dodge v. Essex, 9 Metc. 380; Dearborn v. Boston, etc., R. R. Co., 24 N. H. 179; Clark v. Boston, etc., R. R. Co., Id. 114; Schuylkill Nav. Co. v. Thoburn, 7 S. & R. 411; Watson v. Pittsburg, etc., R. R. Co., 37

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Pa. St. 469. But this inquiry must be proximate and actual, not remote and speculative. Chicago and Peoria R. Co. v. Francis, 70 Ill. 238. Damages cannot be given for the probable injury which his business would suffer from competition, caused by the building of a new road, which would afford greater facilities for travel. In re Mount Washington R. Co., 35 N. H. 134. Nor can anticipated inconveniences from noise in the highway to worshippers be a ground for damages. First Parish v. Middlesex, 7 Gray, 106. See St. Louis, etc., R. R. Co. v. Haller, 82 Ill. 208.

The amount should cover all actual damages for the land taken, for all physical injuries to the residue, and for all inconvenience actually produced. Montmorency Gravel R. Co. v. Stockton, 43 Ind. 328; Jones v. Ch. and I. R. R. Co., 68 Ill. 380; Selma, etc., R. R. Co. v. Redwine, 51 Geo. 470; Same v. Keith, 58 Geo. 178. Damages may be given for dividing a farm in two. Galena, etc., R. R. Co. v. Birbeck, 70 Ill. 208. So also danger to abutting owners from the obstruction of trains. Mix v. Lafayette, etc., R. R. Co., 67 Ill. 319. So of the danger and difficulty of crossing the road. Stone v. F. P. and N. W. R. R. Co., 68 Ill. 394; Rockford, etc., R. R. Co. v. McKinley, 64 Ill. 388.

Benefits may be set off against the damages which the remainder of the property sustains by the construction of the improvement. Todd v. Kankee, etc., R. R. Co., 78 Ill. 530; Atlanta v. Central R. R. Co., etc., 58 Geo. 120; Susanna Booth's Appeal, 77 Pa. St. 276; Elizabethtown, etc., R. R. Co. v. Helm, 8 Bush, 681; P. P. and J. R. R. Co. v. Lawrie, 63 Ill. 264; Hayes v. O. O., etc., R. R. Co., 54 Ill. 373; Jones v. Wills Valley R. R. Co., 30 Geo. 43; Selma, etc., R. R. Co. v. Redwine, 51 Geo. 470; Buffalo, etc., R. R. Co. v. Ferris, 26 Tex. 588; Robbins v. Milwaukee R. R. Co., 6 Wis. 636.

But such benefits as are shared in common by the public, like damages shared in common by the public, cannot enter as an element of set off in the estimate of damages. "The party whose land has been taken for a railroad has a right, in common with his other fellow citizens, to the benefit arising from the general rise of property in the vicinity, occasioned by the establishment of the railroad and the facilities connected therewith." Upton v. South Reading Branch R. R. Co., 8 Cush. 600; Putman v. Douglass Co., 6 Oreg. 328; Farwell v. Cambridge, 11 Gray, 413; Winona, etc., R. R. Co. v. Waldron, 11 Minn. 515; Tobie v. Brown Co., 20 Kan. 14; Sexton v. North Bridgewater, 116 Mass. 200; St. Louis, etc., R. R. Co. v. Richardson, 45 Mo. 466; Keithsburg, etc., R. R. Co. v. Henry, 79 Ill. 220.

But if the owner receives some peculiar benefit, and not common with other landowners or the public, such is the subject of set off. Nichele v. Bridgewater, 23 Conn. 202; Betts v. Williamsburgh, 15 Barb. 255; Mayor v. Livingston, 8 Wend. 85; Com. v. Coombs, 2 Mass. 489; Green v. Fall River, 113 Mass. 262; Pacific R. R. Co. v. Chrystal, 25 Mo. 544; Allan v. Charlestown, 109 Mass. 243.

Where the track, as a whole, is uninjured, damages cannot be given for injury to part of a track. Page v. C. M. and St. P. R. R. Co., 70 Ill. 324; Keithsburg, etc., R. R. Co. v. Henry, 79 Ill. 290; Chicago, etc., R. R. Co. v. Francis, 70 Ill. 238; Shawneetown v. Mason, 82 Ill. 337. When land is divided into blocks by the owner, and dealt with as such by himself, each block is to be considered a separate tract in estimating damages. Todd v. K. and I. R. R. Co., 78 Ill. 530.

When blocks and tracts are not used together, no damages can be allowed for blocks separated by streets from the block in which the land is taken; and if a strip is taken adjoining an existing railroad, no damages can be allowed for land on the other side of the existing railroad. In re N. Y. Cent. R. R. Co., 18 N. Y. Sup. Ct. 149.

In the following cases it was held that the peculiar benefits to the property are not to be set off against the damages. Brown v. Beatty, 34 Miss. 227;

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Alabama and F. R. R. Co. *v.* Burkett, 42 Ala. 83; Carson *v.* Coleman, 8 Stockton, 106; Penrise *v.* Wallis, 37 Miss. 173: Isom *v.* Miss. Cent. R. R. Co., 36 Miss. 300.

JAMES M. BOOKER.

v.

THE VENICE AND CARONDELET RY. CO.

(101 *Illinois Reports*, 333. *January* 18, 1882.)

An allegation in a petition by a railway company to condemn land for a right of way, that the petitioner "has not been able to acquire the title nor the right of way over the land, by purchase or by voluntary grant from" the defendants, though not formal, is substantially sufficient under the statute, as showing an inability to agree as to the compensation to be paid.

A judgment condemning a strip of land one hundred and twenty feet wide for a right of way for a railway will not be reversed because the land condemned exceeds one hundred feet in width, where it does not appear from the record that the additional twenty feet was not necessary, by the pleadings, and no such objection was raised before the court below, either by demurrer or reasons assigned in arrest of judgment. The objection not being made below must be considered as waived.

In a proceeding to condemn land for a right of way, the jury allowed a lessee of the land taken, whose lease had three years to run, the amount of rent he was to pay per acre for the whole term, as to the land condemned, while he contended that for gardening purpose it might yield much more. There was no proof that it would be used for such purpose, and no other damages shown, and it appeared that the lessee had the option of terminating the lease at any time: *Held*, that the verdict would not be set aside as against the evidence, and that future profits of the land taken were too uncertain to be depended upon as a measure of damages.

APPEAL from the county court of St. Clair county; the Hon. F. H. PIEPER, Judge, presiding.

Mr. Frank B. Bowman, for the appellant.

WALKER, J.—The Venice and Carondelet Ry. Co. presented a petition to the county judge of St. Clair county, in vacation, for the purpose of condemning the right of way on which to construct its track over certain lands in that county. The lands are specifically described by metes and bounds. They are alleged to belong to John B. Bowman, and that James M. Booker claims a possessory right in one of the lots, which it is alleged will continue until the first day of September, 1881. It is alleged that the company was not able to acquire the title or the right of way over the premises by purchase or voluntary grant from Booker or Bowman. The petition prays for a summons, and that the damages be ascertained according to law. The county judge indorsed an order for a sum-

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mons, and fixed the time for a hearing on the 24th of June, 1881, and the same was filed on the 10th of that month, and a summons was issued, returnable as ordered. The sheriff returned that he had served Booker on the eleventh, and Bowman on the fifteenth of the month. Booker filed an answer, in which he denies all of the allegations in the petition, except that he has an interest in lot 47 of Cahokia commons. He alleges that he holds a written lease for the same, dated March the 1st, 1880, for a term of five years; that he is residing thereon, and claims that the taking of the right of way will damage him $1000. A hearing was had as to Booker on the day set for trial, but as to Bowman the cause was continued until the 27th of the month. The jury assessed the damages sustained by Booker at $70. Motions for a new trial and in arrest of judgment were entered, but overruled by the court, and a judgment that petitioner might enter on paying the $70. An appeal was prayed and granted, and the record is brought to this court, and errors assigned by appellant.

It is insisted, that this being a statutory proceeding, according to uniform authority every requirement of the statute must appear by the record to have been pursued, and nothing can be presumed in its favor; that under this rule the petition is fatally defective in failing to allege that the compensation to be paid for or in respect of the property sought to be appropriated or damaged for such purpose, could not be agreed upon by the parties; that this is the requirement of the statute, and an inability to agree upon the compensation to be made for the damages sustained, is indispensable to give the court jurisdiction of the subject matter of the dispute; that the allegation that petitioner "has not been able to acquire the title, nor the right of way over the land, by purchase or by voluntary grant, from said Bowman or Booker," is not a sufficient compliance with this requirement of the statute. We do not understand that strictness requires the averment to be in the precise language of the statute. Any allegation that is equivalent is all that strictness requires. From this allegation there can be no other inference than that the effort had been made, and the compensation could not be agreed upon by the parties. If it had, then the company would then have been able to acquire the right of way by purchase. Had the compensation been agreed upon, that would have been to purchase the right; if an agreement had been reached that the company should have the right of way without compensation, that would have rendered the proceeding unnecessary; but such an agreement is negatived by the allegation. The averment necessarily implies that an effort had been made, and that an agreement for compensation could not be arrived at by the parties, and they were unable to agree that damages should be waived. We regard the allegation, although not formal, as being in substance sufficient.

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It is next urged, that the condemnation was a strip 120 feet wide, when the statute only authorizes a strip of 100 feet in width to be condemned for right of way, and the petition proceeds for right of way, and the proceeding must be confined to the petition. The 20th section of chapter 114 authorizes the condemnation of 100 feet for right of way, and a greater width when necessary, for cutting or filling, and it does not appear that the additional 20 feet were not necessary for that purpose. Again, no such objection was raised by demurrer, or on the motion in arrest of judgment. This objection is not found in the reasons assigned in arrest of judgment, and it must be considered as waived, and cannot be urged for the first time in this court.

It is urged that the company failed to prove that the parties had been unable to agree upon the compensation for the damages arising from the appropriation of the strip for right of way. Westerman, the engineer of the road, testified, that he tried to purchase the strip for the railway company from Booker, but they had been unable to agree. This evidence was, we think, sufficient to prove that the parties were unable to agree upon the compensation that should be made.

It is claimed that the jury found against the evidence in assessing the damages. It seems they allowed appellant the sum per acre that he agreed to pay his landlord as rent for the ground. There were about three and a half acres, and the lease had three years to run, and there were witnesses who testified that for gardening purposes each acre would net $25 an acre. It is a complete answer to say there is no evidence that it would be used for such purpose, nor that it could be rented for such a price for that purpose. Again, the lessee had the option of terminating the lease as to any portion, or all of the premises, at any time he might choose, by paying Bowman $4 an acre; and all know that all theories about the production of the soil depend on so many contingencies, that future profits are uncertain, and cannot be depended upon as a measure of damages. These were, all of them, considerations for the jury, and they seem very properly to have allowed him simply the amount of rent he was liable to pay his landlord. It is said, they should have allowed him other damages he sustained. It is enough to say, none other were proved.

We perceive no error for which the judgment should be reversed, and it is affirmed.

Judgment affirmed.

See note, p. 352.

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THE CHICAGO AND WESTERN INDIANA R. R. Co.

v.

MICHAEL MARONEY et al.

(95 *Illinois Reports*, 179. *May* 18, 1880.)

In a proceeding by a railroad company to condemn an entire lot in a city for the use of its road, evidence of the price per foot an adjoining tract had been sold for, and the price per foot at which other lots had been offered for sale, is doubtless competent if offered by the company as evidence in chief, but is not after the defendant has closed.

In a proceeding to condemn land, where the petitioner closes his case and the land-owner gives evidence of the value of the property sought to be taken, there is no error in refusing to allow the petitioner to prove the price at which an adjoining tract was sold, or at which other lots in the vicinity are offered for sale. Such evidence is in chief and not in rebuttal, and it is a matter of discretion to open the case and let in proof which ought to have been given in chief.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. G. & W. Garnett, for the appellant, after a statement of the facts and an argument thereon, made the following points of law:

That this court has correctly laid down the rule that in cases of this character the best evidence of value is actual sales. St. Louis, Vandalia and Terre Haute R. R. Co. *v.* Haller, 82 Ill. 211.

It was held in Lawrence *v.* Boston, 119 Mass. 126, that the peculiar value of property to the owner was not material for the jury to consider, and that it did not make any difference that the owner would give more for the property than any one else rather than be turned out.

Sales of real estate, like sales of any other commodity, inevitably establish the market value in that vicinity, hence the court erred in excluding from the jury this important fact.

Mr. Richard W. Clifford, for the appellees.

The jury did not follow the valuations of either party. The verdict is a compromise.

The testimony rejected was offered after the plaintiff and defendant had both closed the case, and it was not in rebuttal.

Courts of appellate jurisdiction are not much inclined to interfere with the determination of a jury upon a question of fact.

Where the testimony is inharmonious, and where there is evidence to sustain the finding, the verdict will not be disturbed, even if the higher court would have been better pleased with a

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smaller verdict. Nor will the verdict be disturbed unless it is manifestly against the weight of evidence.

Mr. Justice CRAIG delivered the opinion of the court:

This was a petition, brought by the Chicago and Western Indiana R. R. Co. in the county court of Cook county against Michael Maroney, to condemn lot 1, block 7, of Davis' subdivision of a certain tract of land in Cook county, for railroad purposes. The object of the petition was to appropriate the entire lot, which was thirty-four feet wide and one hundred and twenty-five feet long, upon which the defendant had erected a house and barn. The question of amount of damages which should be paid defendant for the property was submitted to a jury, and, after hearing the evidence, the jury returned a verdict in favor of the owner of the property for the sum of $1900, upon which the court entered a judgment, to reverse which the railroad company appealed.

It is not pretended that the court erred in the instructions to the jury, or that there was error in the admission of evidence; but the only ground relied upon to reverse the judgment is, that the damages are too large, and that the court erred in rejecting certain evidence, offered by the railroad company, to prove that a tract of land adjoining the property in question had been sold for $24 per foot, and that other lots in the neighborhood were offered for sale at $25 per foot.

The witnesses who were called upon to testify in regard to the value of the property, as is always the case, differed in their judgment as to the amount the property was worth. If no evidence was to be regarded but that introduced on behalf of the petitioner, then it is quite clear the verdict of the jury was too large, but when the testimony introduced by the defendant is taken into consideration the verdict is no larger than the evidence would justify.

One witness for the defendant testified that the lot, without the improvements, was worth $35 a foot,—$1190 for the land alone. Another witness estimated the value of the land at $40 a foot, or $1360 for the lot without the building. As regards the improvements one witness, an experienced carpenter, says the house was worth $915, while another puts the value at $923. If this evidence was credible and believed by the jury, as it doubtless was, the verdict might have been much larger than the one returned, but the jury doubtless give due consideration to all the evidence introduced by both parties. And we are satisfied the result is just, and fully sustained by the evidence.

In regard to the other point, that the court excluded proper evidence, we do not regard it well taken. The offered testimony, as evidence in chief, was doubtless competent, and had it been offered while petitioner was making out his case in the first instance, the court no doubt would have admitted it. But such was not the

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case. The petitioner introduced his evidence in regard to the value of the property and closed; then the defendant introduced his proof in regard to the value of the property, and closed his case. At this juncture the petitioner offered the proof which the court excluded. As the proof offered was evidence in chief, and not in rebuttal, it was a matter in the discretion of the court whether the case should be opened and the proof admitted.

We see no abuse of the discretion of the court. The same witness had previously been on the stand, and had been examined by petitioner, and if he desired the proof to go to the jury, then was the time the questions should have been asked. He had no right to withhold the evidence until defendant had closed his side of the case, and then introduce it. A practice of that kind would cause needless delay in the trial of causes.

The judgment will be affirmed.

See note, p. 352.

The Kansas Central Ry. Co.

v.

William A. Allen.

(24 *Kansas Reports*, 33. *July Term*, 1880.)

On an appeal from an assessment of damages done to a farm by reason of the appropriation of a right of way through it for a railroad, it is competent for a witness, who is a farmer, and well acquainted with the market value of the land in the vicinity, to testify to the value of the farm before and after the location of the railroad.

Error from Jefferson District Court.

At the November Term, 1879, of the district court, Allen, as plaintiff, had judgment against the railway company for $500 and costs. The defendant brings the case here.

E. Stillings, for plaintiff in error.

John S. Hopkins, Louis A. Myers, and Morse & Foster, for defendant in error.

Horton, C. J.—This proceeding, in the court below, was an appeal from an appraisement and assessment of damages made by commissioners appointed by the district court of Jackson county, to assess damages for land taken and injured by the Kansas Central Ry. Co. in the location and construction of its railroad. This is the second time the case has been here. Kas. Cent. Ry. Co. *v.* Allen, 22 Kas. 285.

Certain questions are now raised as to the competency of the evidence of the owner of the land. It appears from the record

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that the land is improved; that the witness was in the possession of the land at the time the right of way across the land was laid out; that he was a farmer by occupation, and had been engaged in that business for over thirty years; that he was well acquainted with the market value of lands and farms in the vicinity in 1877; also, before and after that time; that he knew what was the market value of the land before and after the location of the railroad across it.

In answer to the question, "What was the fair market value of the land as an entire thing just before the right of way was laid out?" the witness said, "Twenty dollars per acre."

In answer to the question, "What was the fair market value of the land as an entire thing just after the right of way was set apart and appropriated for the use of the railway?" the reply was, "Fifteen dollars an acre."

These questions and answers were objected to, and the plaintiff in error, the railway company, claims the trial court erred in admitting this evidence.

It was decided, in the case of St. L. L. & D. R. R. Co. *v.* Wilder, 17 Kas. 239, that damages were properly allowable for the actual value of the land taken by the railroad company, and for consequential diminution in value of the rest of the land. In M. K. & T. Ry. Co. *v.* Haines, 10 Kas. 439, it was held, that in assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the commissioners or jury may always take into consideration all incidental loss, inconvenience, and damages, present and prospective, which may be known, or may reasonably be expected to result from the construction and operation of the road in a legal and proper manner. That the jury may have before them such facts as will enable them to render a verdict in accordance with these rules, a plaintiff may show generally the value of the land before and after the appropriation. Of course, the opposite party, by cross-examination, may bring out the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment. While the witness cannot give his opinion as to the amount of damages which the landowner sustains by the location and operation of the railroad across the land, yet he may testify to the value of the land before and after the location of the railroad, as such evidence is mainly a statement of facts. The evidence objected to was admissible, and the judgment of the district court will be affirmed.

All the justices concurring.

See note, p. 352.

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FREMONT, ELKHORN AND MISSOURI VALLEY R. Co.

v.

WHALEN.

(*Advance Case, Nebraska. November* 12, 1881.)

Where land is condemned for railroad purposes the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken; and where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that; but injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered.

Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken.

Witnesses should not be permitted to express their opinions before the jury of the value of the land, subject to the right of way. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the opinion of others.

ERROR to the District Court for Stanton county, the cause having been brought there on appeal by Whalen from an assessment of damages in the sum of $191, made in the county court in his favor, on account of the location of the railroad over certain land owned by said Whalen. Trial before BARNES, J., and a jury, with verdict and judgment against the railroad for $892.11.

Joy & Wright, for plaintiff.

H. C. Brome and J. A. Erhardt, for defendant.

LAKE, J.—The first error complained of is that the damages found by the jury were not warranted by the evidence. If all of the evidence submitted to the jury, and which, by the instruction of the judge, they were required to consider in making up their verdict, had been competent, this objection to the finding would have been without merit; but, for the reasons we shall give in considering another branch of the case, we are of opinion that it is well taken. The second and third errors assigned are of like import, and need not be separately considered. The fourth error assigned is "that the court erred, over the objection of the defendant company, in permitting the introduction of the testimony by plaintiff in the court below of the witnesses James McKinney" and others, "upon the matter and question of value of real estate and damages sustained in the location of said road." This objection is too general. Much of the testimony of each of these witnesses was clearly admissible upon the questions here referred to; therefore, to avail, the objection should have specified the particular portion aimed at, as by giving the number of the question or

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answer supposed to have been improperly admitted. The fifth and sixth assignments have the same defect, and will not be further noticed. The seventh, eighth, and ninth errors assigned pertain to the judge's charge. The instructions particularly complained of are the third, fourth, and fifth, as numbered in the record. These are all devoted to one subject—the rule of damages by which the jury were to be guided in making up their verdict. By them, in very general terms, the jury were in substance told that, in estimating the damages to which the owner of the land was entitled, they should, from all the evidence before them, ascertain the fair market value of the land at the time of the condemnation of the portion taken for right of way. This done, they should next find from all the evidence the market value of the tract with the right of way carved out of it, excluding from their consideration all incidental benefits which might be supposed to flow to the public from the building of the road; and if the market value so ascertained, "immediately after and on the carving out of said right of way therefrom, was equal to or greater than it was immediately before the taking of said right of way," then no damages should be awarded; but if they found the value of the tract to be less with the right of way taken than it was before, the difference would be the true measure of damages.

The rule of compensation for right of way here laid down is clearly erroneous. It not only states the law incorrectly, but seems to have been given without much if any regard to the evidence which the jury were to consider. For instance, there was no evidence whatever tending to show that the land, after the condemnation for right of way, "was equal to or greater than it was immediately before, so that it was impossible for the jury to so find, and their minds ought not to have been encumbered, if not confused, by a question not properly before them. But even if there had been evidence of the character implied by this portion of the charge, still the owner of the land would have been entitled to damages equal to the value of the portion appropriated to the purposes of the road. It is true that this particular part of the judge's charge could not have prejudiced the railroad company if properly understood by the jury; and if the instruction to return no damages in a certain contingency were the only fault, the verdict would not be disturbed at the instance of the present plaintiff in error.

As before stated, the charge was in general terms. It failed almost entirely to instruct the jurors as to their duties under the law. It is true, they were told to find the respective values of the land before and after the condemnation, but there was no allusion whatever to the proper mode of doing so, which, in view of certain testimony before them, we consider a very important omission. As to the value before the right of way was taken, doubtless the jury would have had no difficulty in reaching a just result without any

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instruction at all; but not so as to the subsequent value. This, in the estimation of the witness for the defendant in error, was lessened by the location of the road from three to eight dollars per acre. But, as clearly brought out by the cross-examination of these witnesses, this depreciation was caused chiefly by merely speculative considerations, which had no proper place in the estimate, and which ought to have been excluded from the jury. For instance, the cross-examination disclosed that, aside from the value of the land taken for the right of way,—which was about 10 acres, and worth, according to the very highest estimate, not to exceed $20 per acre,—the chief ingredient of damages was the supposed inadequacy of a certain culvert, in case of unusually high water, whereby a portion of the land might be flooded; the liability of stock to be killed by getting upon the track; the possibility of destruction of property by fires started by passing trains; and the inconvenience of being compelled to go an unreasonable distance in getting from one portion of the farm to the other, there being but a single track crossing, and that, perhaps, not very conveniently located, according to the testimony of some of the principal witnesses.

The damages based upon the supposed insufficiency of the culvert, and the possible destruction of property by fire and otherwise, through the carelessness of the company's agents in operating the road, were too uncertain and remote to be taken into the estimate, and valuations of the land based in part thereon were entitled to no weight with the jury. King *v.* Iowa Midland R. Co., 34 Iowa, 455; Lehigh Valley R. Co. *v.* Lazarus, 28 Pa. St. 203; Patton *v.* N. C. R. Co., 33 Pa. St. 426; Fleming *v.* C., D. & M. R. Co., 34 Iowa, 353. Damages to be paid by the company upon the condemnation do not cover those caused by injuries resulting from negligence or unskilfulness in either the construction or operation of the road. Delaware, Lackawanna & Western R. Co. *v.* Salman, 23 Am. Rep. 214; 10 Vroom, 299. And, even if they were in fact included in the assessment, their payment would be no bar to future actions brought for such injuries. The damages for which the law provides, and proper to be included in the assessment for the right of way, are simply those which it can be said with reasonable certainty the owner of the land will sustain by reason of its appropriation; in other words, such damages as are necessarily incident to the proper construction and careful management of the road, leaving injuries resulting from negligence to be compensated for by action whenever they occur. Id.

In submitting such assessments to the decision of jurors, it is of the utmost importance that they be given clearly to understand the rules by which they must be governed in making them; and they should be plainly told by the judge what elements of damage the particular case presents, and which are proper to be considered in fixing the amount to be returned by their verdict.

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To say to the jury merely that they are to allow the difference between the value of the land before the road was laid through it and its value afterwards, is little if any better than no instruction at all, for they are left practically without guide, and to uncertain conjecture as to the elements affecting the subsequent value. As before stated, the owner of the land is entitled to recover, in any event, as one item of damage, the fair value of the portion actually taken (Wagner *v.* Gage County, 3 Neb. 237); and in addition to this, he should have allowed to him a reasonable compensation for whatever damage the evidence shows must necessarily be done to the residue of the tract from the proper construction and future careful operation of the road. Where the evidence shows that the land owner will be specially benefited by the location of the road, such benefit may go to reduce the damages to the residue of the land, but cannot be set off against the value of the part actually taken. But those benefits which are common, and shared in by others as well, cannot be considered to reduce his damages.

The practice indulged in on the trial of this and other cases, of taking the opinion of witnesses as to the value of the land, subject to the location of the road over it, ought not to be permitted. A strong objection to it lies in the fact that indirectly the damages are assessed by the witnesses, instead of the jury, whose duty it is, and most likely on an improper basis. It is doubtless a proper course to take the opinion of experts as to the value before it is affected by the location of the road. This done, the testimony on the question of damages should be confined to those matters affecting the value proper to be considered, leaving the jury to draw their own inferences therefrom, unaffected by the judgment of others.

For these reasons the judgment must be reversed and a new trial awarded.

See note, p. 852.

FREMONT, ELKHORN AND MISSOURI VALLEY R. CO.

v.

LAMB.

SAME

v.

SAME.

(*Advance Case, Nebraska. November* 12, 1881.)

Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed.

By the laws of this state railroad companies are required to fence their

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track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of the omission.

And, when requested by the owner of land crossed by the road of the company, are required to make and keep in good repair an adequate means of crossing the track.

ERROR to the District Court for Stanton county.

Joy and Wright, for plaintiff.

H. C. Brome and John A. Ehrhardt, for defendant.

LAKE, J.—The questions presented by the records in these two cases are in all respects the same as we have already considered at this term, in the case of Freemont, Elkhorn and Missouri Valley R. Co. *v.* Whalen, ante, 491. The course pursued in the examination of witnesses to prove damages by reason of the location of the road, and the character of the testimony, were not materially different. The instructions given to the jury in the three cases were identical. It is unnecessary, therefore, to go over the ground covered by the opinion in the Whalen case, as we have nothing material to add to what is there said. However, as a fair sample of the evidence which the jury were particularly instructed to consider on the question of damages, we will give the direct examination of a witness in each of these two cases in full. In the first case, in their numerical order, H. C. Davis was called by the defendant in error, and testified as follows:

Question. Are you acquainted with the value of lands in Stanton county—the fair market value? Answer. I believe I am fairly acquainted with the value of lands in this vicinity. Q. Were you acquainted with the fair market value of the S. ½ of the S. E. ¼ of section 16, township 22, range 2, east of the sixth P. M., before the building of the railroad? A. How long ago? Q. Immediately before; were you acquainted with the fair market value of that land? A. I believe I was. Q. What would be the fair market value of that piece of land before that road was built? A. About $10 or $11 an acre. Q. How much would that 80 acres of land be worth—not by the acre, but the entire piece, together—before the road was built? A. About $850, in my judgment. Q. What was the fair market value of that piece of land immediately after the railroad had been completed through it? A. I should not think that it would sell for more than eight dollars an acre. Q. What was the entire tract worth immediately after the railroad was completed through it, exclusive of what they took? A. I would have to base my opinion in regard to the value of that in consideration of the course the road takes. Q. What I want to get at is the fair market value of the tract at that time taking everything into consideration. A. I should think the remainder of the land would be worth at least, or about, $640.

And in the other case J. R. Layton, the first witness after Lamb

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himself, gave the following on his examination in chief on the question of damages:

Question. Are you acquainted with the value of lands in Stanton County? Answer. To some extent, I am. Q. Do you know the value of the piece of land in controversy—that is, the south half of the S. E. ¼ 34, 24, 3 E.—before the railroad company built across it? A. Well, I don't know that I would put it over from $1600 to $1800. Q. Do you know what the reasonable market value of the land was? Answer whether you know that fact. A. I believe I do. Q. What was it worth before the railroad company built across it? A. From $1500 to $1800. Q. What was it worth after the railroad company built across it? A. I should not consider it worth over $500. Q. You have examined the piece of land, have you, and know how the road runs through it? A. Yes, sir; I have made no particular examination for that purpose, though. Q. You know how the railroad runs across it? A. Yes, sir.

From what is here given, which is the entire testimony in chief of these two witnesses on the question of damages, and a fair sample of that of all the others, it will be seen that the province of the jury was directly invaded, and the damages estimated by the witnesses in accordance with their own peculiar notions of what caused them. The quantity of land taken in one case was about five acres, worth, in the aggregate, not to exceed $60, and in the other six and a half acres, worth not more than $160; yet, according to the several estimates of these witnesses, and with no fact or circumstance beyond the taking of the land stated, the jury were told that the damage done to one tract was $210, and in the other from $1000 to $1300, the estimated decrease in value in consequence of the road. And this is the character of much of the testimony the jury were specially charged to weigh in making up their verdict.

Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed. If the value of the residue of these two tracts were so greatly reduced by reason of the road, this result was for the jury to determine, not from the opinions of the witnesses, but from the legitimate facts and circumstances properly brought to their notice; and the use of witnesses in such a trial is to acquaint the court and jury with these facts and circumstances, but not to measure their effect. As in Whalen's case, above referred to, the cross-examination of witnesses disclosed the fact that some of their estimates were, in part at least, based upon facts and suppositions foreign to the issues, and which ought to have been excluded from the consideration of the jury, such as the

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presumed inadequacy of a culvert, injuries to property, want of track crossings, etc.

By the law of this state railroad companies are required to fence their track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of this omission of duty. Section 2, art. 1, c. 72, Comp. St. And, when requested by the owner of land crossed by the road, they are required to make and keep in good repair one crossway, or other adequate means of crossing the track. Section 106, c. 16, Comp. St. The want of means for crossing the road, and the watching of cattle to keep them from the danger of passing trains, therefore, being provided for, have no proper place in a trial of the question of damages for the right of way.

For manifest errors in the admission of testimony, as well as in the instruction to the jury, which are pointed out in Whalen's case, the judgment must be remanded and a new trial awarded.

Reversed and remanded. See note, p. 352.

THE CENTRAL BRANCH UNION PACIFIC R. R. CO.

v.

R. S. ANDREWS.

(*Advance Case, Kansas. January*, 1882.)

Where a railroad company obstructs an alley in a city, by building a railroad track through the alley, so as afterwards to make the alley useless as an alley, an abutting lot owner has the right, if he chooses, to consider the obstruction as a permanent taking and appropriation of the alley by the railroad company, and may commence an action against the railroad company and recover damages for such obstruction, and in such case, the measure of his damages will be the injury to his lot at the time the alley was taken and appropriated by the railroad company, and not at the time of the trial of the case.

Other matters considered in the opinion.

ERROR from Atchison county.

Everest and Waggener, for plaintiff in error.

Hudson and Tufts, for defendant in error.

Everest and Waggener cited:

Central Br. U. P. R. R. Co. *v.* Twine, 25 Kan. 591; Kansas Pacific R. R. Co. *v.* McLernon, 17 Kan. 227; St. Joe and D. R. R. *v.* Orr, 8 Kas. 420; 10 Minn. 267; 19 Minn. 500; 17 Minn. 439; 18 Minn. 384; 21 Minn. 125 and 126; 21 Minn. 424; R. R. Co. *v.* Blackshire, 10 Kan. 477; Com. Jackson Co. *v.* Craft, 6 Kan. 145; McClure *v.* Ry. Co., 9 Kan. 373; 6 Kan. 145; 9 Kan. 373; McKivitt *v.* Cone, 30 Iowa, 457; Upton *v.* Knoll, 32 Iowa,

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122; R. R. Co. *v.* Garside, 10 Kan. 552; Moses *v.* Ry. Co., 21 Ill. 515; Murphy *v.* Chicago, 29 Ill. 286; Porter *v.* R. R. Co., 33 Mo. 128–138; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49; Tomlin *v.* Ry. Co., 32 Iowa, 106; Milburne *v.* Cedar Rapids, 12 Iowa, 246; 11 Ill. 554; 8 Dana (Ky.), 298; Chapman *v.* R. R. Co., 10 Barb. 362; Hunter *v.* Ry. Co., 13 Barb. 646; Cook *v.* Burlington, 30 Iowa, 104–105; R. R. Co. *v.* Brown, 17 B. Mon. 752–776; Radcliffe, Ex. *v.* Mayor, 4 N. Y. 195; Gurno *v.* City, 12 Mo. 414; Taylor *v.* City, 14 Mo. 20, 27; Pa. St. 357; Pierce on Railroads, 186; R. R. *v.* Speer, 56 Pa. St. 334; Snyder *v.* R. R., 55 Pa. St. 340; Watson *v.* R. R., 37 Pa. St. 480; Carson *v.* R. R., 35 Cal. 325; 56 Pa. St. 325; 6 Whar. 25; 3 Brewster, 547; 3 Phil. Rep. 164; 2 Stockton, Ch. 352; Whittiker *v.* R. R. Co., 38 Me. 29; Cushman *v.* Smith, 34 Me. 247; Rogers *v.* R. R. Co., 35 Me. 319; Gov., etc., of the Cast Plate Mft., 4 T. R. 794; Button *v.* Crowther, 2 B. & C. 703 (9 E. C. L. Rep. 227); King *v.* Com. of Sewers, 8 B. & C. 355; Goszler *v.* Georgetown, 6 Wheat. 593; Davis *v.* Ry. Co., 46 Iowa, 397; Tate *v.* R. R. Co., 64 Mo. 149; Davenport *v.* Stevenson, 34 Iowa, 225; Cadle *v.* R. R. Co., 44 Iowa, 11–15; Smith *v.* Washington, 20 How. (U. S.), 135; O'Connor *v.* Pittsburg, 18 Pa. St. 187; Gall *v.* Cincinnati, 18 O. St. 563; Mills on Eminent Domain, Sec. 173; Bridge Co. *v.* Ring, 58 Mo. 496; 117 Mass. 302; Haslam *v.* R. R. Co., 64 Ill. 353; R. R. Co. *v.* Doughty, 22 N. J. L. 495; Regnior *v.* Brown, 36 L. J. (Q. B.) 322; Dwight *v.* Hampden, 11 Cush. 201; Matter of Furman St., 17 Wend. 649; R. R. Co. *v.* Boston, 111 Mass. 125 and 132; R. R. Co. *v.* R. R. Co., 12 Cush. 605 and 611; Kuckemann *v.* Ry. Co., 46 Iowa, 375–377, 378; Ry. Co. *v.* Burson, 61 Pa. St. 369; 20 Pa. St. 240; Daniels *v.* Ry. Co., 41 Iowa, 52–55; Whitman *v.* R. R. Co., 7 Allen, 313; Ry. Co. *v.* Stauffer, 60 Pa. St. 374; Locks and Canals *v.* R. R. Co., 10 Cush. 385; Morrow *v.* Saline Co., 21 Kas. 503–505; Drew *v.* New River Co., 6 C. & P. 754; Whitehouse *v.* Fellows, 10 B. B. (N. S.) 735; 6 H. & N. 488; 97 Mass. 555; 17 N. J. Eq. 75; 24 N. J. Eq. 49.

On the 13th day of September, 1878, the defendant in error, R. S. Andrews, as plaintiff, filed his petition in the district court of Atchison county, alleging in substance that the plaintiff in error, the Central Branch Union Pacific R. R. Co., was a railroad corporation incorporated under the laws of the State of Kansas; that the city of Atchison was a city of the second class in such State; that the plaintiff was, and for many years had been, the owner and in the possession of lots numbered 16, 17, 18, 19, 20 and 21, in block 23, in Challiss' addition to said city; that immediately south of and next adjoining these lots was an alley 15 feet wide, which alley had been duly set apart and dedicated to the use of the public, and for the use and benefit of adjoining lot owners, and for all proper uses as a street or alley in said city; that for many years previous to the 1st

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day of August, 1877, the alley had been open to the use of the public in the same manner as other alleys and streets in said city; that the plaintiff had long been accustomed to, and had and has a right to use the alley, and that the alley was and is the only way by which the plaintiff can have ingress and egress from the south end of his lots; that on or about the first day of August, 1877, the defendant illegally, wrongfully and improperly obstructed the alley, by illegally, wrongfully and improperly digging ditches therein and laying down and building its railroad track therein, and since about the first day of August, 1877, has kept its railway cars and coaches continually and at all times standing upon its track in said alley; and has kept the ditches and the track in such condition as to illegally, wrongfully and improperly obstruct the alley, during all the time since about the first day of August, 1877, and has since that time illegally, improperly and wrongfully deprived this plaintiff of all use and benefit of the alley; that at that time, and before and since, and at this time the plaintiff had and has upon his lots lasting and valuable improvements, consisting of two large and commodious dwelling houses, together with barns, stables, etc., used as residence property, and that by reason of the acts aforesaid the plaintiff has sustained damages in the sum of $5000.

On the 4th day of October, 1878, the defendant railroad company filed its answer, containing in substance a denial of the allegations of plaintiff's petition. The defendant also set up the act of the legislature of the Territory of Kansas, under which it was incorporated, also a copy of an ordinance of the city of Atchison, granting to it the right of way on and over said alley, which ordinance was passed and approved June 22, 1864, and also another ordinance of the city of Atchison, passed and approved December 13, 1870, amendatory of the first mentioned ordinance, and further alleging that said track along and over said alley was laid down and constructed under and by virtue of the laws of the Territory and the State of Kansas, and in pursuance of, and in strict conformity to the terms and provisions of said ordinance of the city of Atchison.

After the disposition of several motions filed by the plaintiff on the 29th day of January, 1879, the plaintiff filed his reply to defendant's answer, which was in effect a denial of the allegations of the answer. On the 29th day of April, 1879, the plaintiff verified his reply by attaching thereto his affidavit. The defendant filed a motion to strike out the verification to the reply, which motion was overruled and defendant excepted.

On March 4, 1879, the railroad company filed its motion for judgment on the pleadings. This motion was overruled, defendant duly excepting, and on June 29, 1879, the railroad company filed its motion to have the city of Atchison made a party to the action. This motion was also overruled, defendant duly excepting.

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case was tried at the November term of the court in 1880, e the court and a jury. The trial resulted in a general verdict he plaintiff against the railroad company for $2000. A mo- for a new trial was made by the defendant and overruled by court; also a motion for judgment on the findings of fact; and ment was rendered on the verdict against the railroad com- , and in favor of the plaintiff, for $2000. The railroad com- duly excepted, and now brings the case to this court for ew.

addition to the general verdict, particular questions of fact submitted to and answered by the jury.

he record contains all the evidence and instructions, and is a and complete transcript and history of the case and all the eedings therein.

he wrong committed by the defendant, and for which the ntiff claims damages, was in constructing one of the side-tracks s road through the alley south of the plaintiff's lots, and there- so obstructing the alley that it could not any longer be used as alley. This side-track was constructed about August 1, 1877. This suit was commenced September 13, 1878, and the trial of this case was commenced November 23, 1880. The jury allowed the plaintiff $2000 damages; and this was upon the principle that the plaintiff's lots were worth at the time of the trial $8000, and that they would have been worth at that time $10,000, if the alley had not been obstructed by the railroad company.

Some of the special findings of the jury do not seem to be entirely harmonious with their general verdict, or with their other special findings. Among their special findings are the following:

"4. Was said track through said alley constructed in a proper manner?

"A. In usual manner for railroad purposes.

"6. Since the laying down and construction of said track in said alley, has the defendant permitted cars to remain unreasonably and unnecessarily on said track?

"A. We don't know.

"8. If the plaintiff in entitled to recover herein, what damage is he entitled to as compensation for the use of the ground over which said track is located?

"A. None.

"9. If the jury find a general verdict for the plaintiff what portion of the amount allowed to the plaintiff is awarded as compensation for the use of the ground over which said track is located?

"A. None.

"10. What amount of damage has the plaintiff sustained by reason of the defendant's permitting cars to remain unreasonably and unnecessarily on said track, since the 13th day of September, 1878, the date of the commencement of this suit?

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"A. No damage.

"12. If the plaintiff has sustained any damage by reason solely of the laying down and construction of said track in said alley, did such damage accrue to the plaintiff by reason of his inability to use said alley for the purposes it had been used previous to the construction of said track?

"A. No.

"13. What was the value of the use of said alley to the property in controversy, just prior to the laying down and construction of said track therein?

"A. We don't know.

"14. If the jury find a general verdict for the plaintiff, what portion of said verdict is allowed plaintiff as the value of the use of said alley to the property in controversy?

"A. None.

"15. What amount of damage did plaintiff sustain prior and up to the 13th day of September, 1878, by reason of the construction of said track, so far as the same had been constructed in a legal and proper manner?

"A. No definite amount.

"16. What amount of damage did plaintiff sustain prior and up to the 13th day of September, 1878, by reason of the reasonable and necessary use of said track by the defendant?

"A. None.

"17. What amount of damage has plaintiff sustained since the 13th day of September, 1878, by reason of any unreasonable and unnecessary use of said track by defendant?

"A. None.

"19. What was the market value of the property in question just before the track was laid down in said alley in 1877?

"A. We don't know.

"23. Regardless of the fact whether said alley is obstructed or not, is the property of plaintiff as suitable and valuable for residence property as for other purposes?

"A. We do not know.

"29. Has the market value of plaintiff's property been affected by the running and operation of cars, engines and trains along and over said track?

"A. No.

"30. For several months previous to this date, has the defendant company in any manner used and operated said side track?

"A. No.

"31. On or about January 1st, 1880, did the defendant company cease to use and operate said side track for any purpose?

"A. Yes.

"32. What railroad company has used and operated said side track since about January 1, 1878.

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"A. Missouri Pacific Railway."

There were several errors committed in this case, which we think will require a reversal of the judgment of the court below; for instance, evidence was admitted that ought to have been excluded, and evidence was excluded that ought to have been admitted. Sufficient latitude was not allowed the defendant on the cross-examination of the plaintiff's witnesses and the court tried the case upon a wrong theory as to the measure of damages. The court refused to give the following instruction, which we think is good law and applicable to the case: "21. The jury are instructed that in estimating the value of plaintiff's property, their estimate must not be made upon the basis that it is residence property alone, but they must take into consideration the true market value of said property with reference to its capabilities." See authorities cited in brief of counsel for plaintiff in error. And the case was tried by the court below from beginning to end upon the erroneous theory, as we think, that the damages sustained by the plaintiff below were to be estimated upon—the basis of the consequent diminution of the value of the plaintiff's property, caused by the obstruction of the alley at the time of the trial, and not upon any theory of the reduction of the value of his property or of any injury thereto at any previous time.

This last-mentioned error is probably the most material one committed in the case; and it is the only one to which we shall give any further consideration. The plaintiff has chosen to consider the obstruction of the alley as a permanent injury to his lots, as a quasi condemnation and permanent taking and appropriation of a certain interest in his property; and he can, therefore, recover merely for the consequent depreciation in value of his property by reason of such permanent injury, by reason of such permanent taking and appropriation, by reason of such quasi condemnation. He had the privilege to consider the obstruction of the alley as only a temporary injury, and to have sued for any special or temporary damage which might have occurred at any time by reason of the obstruction. But it seems he did not choose to so consider the obstruction; he chose to consider it as permanent; and, as he had chosen to consider it as permanent, and amounting to a permanent taking and appropriation of an interest in his property, he must be governed by the rules generally governing condemnation proceedings. He must go back to the time when the property was actually taken and appropriated and ascertain the amount of the injury which his property then sustained by reason of such taking and appropriation. This we think is the universal rule applied in condemnation proceedings. St. J. & D. C. R. R. Co. *v.* Orr, 8 Kas. 420; Gulf R. R. Co. *v.* Owen, 8 Kas. 410; Sherwood *v.* St. P. & C. Ry. Co., 21 Min. 122, and cases cited; Warren *v.* 1st Div. of St. P. & P. R. R. Co., 21 Min. 424; Old

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Colony R. R. Co. *v.* Miller, 125 Mass. 1; Pitkin *v.* City of Springfield, 112 Mass. 509; Cobb *v.* Boston, 109 Mass. 438; S. R. & D. R. R. Co. *v.* Keith, 53 Ga. 178; Stafford *v.* The City of Providence, 10 R. I. 567.

The defendant in error, plaintiff below, seems to admit that the damages should be estimated in cases like this as of the time when the plaintiff consents that his property shall be permanently appropriated by the railroad company; but he claims that he does not consent to any such appropriation until the judgment for such damages is rendered in his favor. It seems to us that he gives his consent when he brings the action for such damages. It seems to us that he then consents that the railroad company shall permanently appropriate his property in the alley, for he then brings his action for damages because of such appropriation; and it seems to us that when he gives such consent, the consent must be considered as relating back to the time when the railroad company originally took the property. If it does not, then the plaintiff would have an action for every special damage that he may have suffered during the intermediate space of time between the taking of the property and the giving of his consent. If his consent does not relate back so that the bringing of the action for the permanent injury to his property does not cover all intermediate special injuries sustained after the property is taken and before he gives his consent, then he might have a large number of actions for special injuries, although he may have already sued and recovered for the general injury resulting from the original taking and appropriation. Besides, if the plaintiff should be allowed to have his damages estimated as though they had accrued at the time of the trial, he might recover more than his lots were actually worth at the time the alley was appropriated. Suppose that his lots were worth only $1000 at the time the alley was appropriated, and suppose that the obstruction of the alley would injure the value of his lots at that time just one-fifth, thereby reducing their value to just $800; and suppose that the improvements made then and afterwards by the railroad company and others should so enhance the value of the lots that at the time of the trial the lots would be worth $10,000, provided the alley was not obstructed; and suppose that the obstruction of the alley would still reduce the value of the lots just one-fifth, thereby reducing their value to just $8000, his damages then would seem to be at the time of the trial just $2000. Now, if he should be allowed to recover this $2000 he would recover twice as much as his lots were actually worth at the time the alley was first appropriated. This would not seem to be right. Can property worth only $1000 be injured by a wrongful act to the extent of $2000? The plaintiff in this case owned six lots, and the alley was only fifteen feet wide. Now, when the alley was obstructed, he might have made a road-way fifteen feet wide all

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around his lots, except in front where the street was located, and made his lots, except for the amount of land thus appropriated for his road-way, about as valuable as they were before the alley was appropriated; hence, it would seem that the plaintiff should not have the power to recover at any time for the obstruction of the alley twice the amount that his property was worth at the time of the obstruction. Whether the plaintiff's lots have been increased in value, or not, by the improvements made by the railroad company, we do not know. It would seem, however, that there are now eight or ten railroad tracks in the vicinity of the track that passes through the alley. And from this we might infer that the improvements made by the railroad company, and the improvements induced to be made by it, has materially enhanced the value of the plaintiff's property. And suppose, further, that after the railroad company had appropriated the alley, the plaintiff should put costly improvements on his property which would not be of any value unless he could use the alley, then should he be allowed to recover damages as of the time of the trial and for the full value of these costly improvements?

But it is not necessary to multiply arguments or to make suggestions to show that the plaintiff should not recover damages as of the time of the trial; for, unless very strong reasons can be shown that he should recover damages as of that time, the rule governing as to the measure of damages in condemnation proceedings should prevail. It would not be justifiable to make distinctions, or to multiply rules for the measure of damages, where no sufficient reasons therefor exist. The defendant in error, plaintiff below, has not furnished us with any sufficient reason why the rule governing in condemnation proceedings should not govern in this case; and no sufficient reason has occurred to us. One of the principal differences between the ordinary condemnation proceedings and this is that in the ordinary condemnation proceedings the permanent interest in the property is taken by the other party without the consent of the owner, while in this case the owner consents that the permanent interest in his property may be taken.

We think that the plaintiff can recover only such damages as he sustained at the time the alley was taken and appropriated by the railroad company.

The judgment of the court below will be reversed and cause remanded for further proceedings.

All the justices concurring.

See note to Terre Haute, etc., R. R. Co. *v.* Scott, 3 Am. & Eng. R. R. Cas. 218; also to Union R. R. Transfer and Stock Yard Co. *v.* Moore, supra,

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TOLEDO, ANN ARBOR, AND GRAND TRUNK RY. CO.

v.

JAMES M. DUNLAP, MARY ANN DUNLAP, AND ERWIN D. BROOKS.

(*Advance Case, Michigan. Jan.* 5–18, 1882.)

Strictly judicial powers can, in Michigan, be vested only in certain courts named in the Constitution. The circuit courts, as courts, have such powers; but the judges, out of court and merely as judges, cannot exercise them.

Proceedings to condemn lands for railway purposes, though subject to judicial review and supervision, are not judicial proceedings and do not involve a contest on litigious rights; they are special proceedings by a temporary tribunal selected for the occasion.

In Michigan the inquiry, in proceedings to condemn lands for railroads, is as to an appraisal or estimate of values and a determination of the necessity of the proposed taking for public purposes.

If, in proceedings to condemn lands, a jury has been summoned under proper circumstances, has conducted its inquiries legally and with due regard to private rights, and has reached a legitimate conclusion as to the necessity for the condemnation and the compensation, the appropriation of the land, on payment of such compensation, will be lawful and will not be affected by collateral action by the judge or court.

A judge cannot, by ex parte action, interfere in a proceeding which is not a suit in court, with regular legal proceedings pending in the ordinary course of justice, where the parties interested have no notice beforehand, nor any regular means of relief.

The owner of lands sought for the use of a railway company cannot be compelled to determine, at his peril, whether a jury will regard the land as necessary for public use; he cannot, therefore, be in fault for refusing a tender for it when he can have no assurance that the proposed improvement will be sanctioned.

The statute for condemning lands for railway purposes is fatally defective in not providing a means or tribunal for determining the question of tender, which cannot be done by the judge or a jury.

The owner of lands sought by a railway company in condemnation proceedings is not deprived of any rights by the mere deposit, pending appeal, of the sum awarded by the jury, as there is no statute requiring him to take the risk of such a deposit, or depriving him of any rights until he is paid.

An act entitled, "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," is not unconstitutional, on the ground that the title provides for more than one object, its object being to bring together the legislation concerning the creation and management of railroads.

The power of a railroad company to begin proceedings for the condemnation of lands within the State, is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same State as the original company.

Where a railway company seeking to condemn lands does not obtain authority from the owner in fee, it can obtain no rights of control over the land by any license or grant from the holder of a contingent dower interest or a tenant at will.

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A railway track or other improvement wrongfully placed upon land by a railway company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty for the purpose of increasing its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company.

A judge or circuit court commissioner "attending" a jury in proceedings to condemn lands forms no part of the special tribunal, and his functions are at most advisory. Under the Constitution of Michigan as well as at the common law such a jury are judges of both law and fact, and where their proceedings are not based on false principles, an appellate court will not consider questions raised on merely technical objections to the admission or rejection of testimony by them, though in accordance with the magistrate's rulings.

The jury, in proceedings to condemn lands, are not bound by the testimony submitted to them, but are also expected to use their own judgment and knowledge from a view of the premises and from their own experience as freeholders.

The findings of a jury in proceedings for the condemnation of lands will not be set aside unless upon objections raised to the record, and unless the record shows that the proceedings were erroneous.

Where proceedings to condemn lands were affirmed so far as the findings of the jury were concerned, but beyond that were reversed, costs of the Supreme Court and of the proceedings below were allowed to the appellants.

APPEAL to the Supreme Court from the appraisal and report of a jury in proceedings to condemn lands, and from the order confirming them. Respondents appeal. Affirmed, so far as relates to the findings of the jury; reversed as to remaining orders and proceedings.

James M. Ashley, Jr., and Aug. C. Baldwin, for petitioner cited, in support of the constitutionality of the railroad law, in respect to its title: People *v.* Mahaney, 13 Mich. 481; Underwood *v.* McDuffie, 15 Mich. 367; Inkster *v.* Carver, 16 Mich. 484; People *v.* State Ins. Co., 19 Mich. 398; Harrington *v.* Wands, 23 Mich. 385; Swartworth *v.* Mich. Air-Line R. R., 24 Mich. 389; Conn. Mut. Life Ins. Co. *v.* State Treasurer, 31 Mich. 17; Kurtz *v.* People, 33 Mich. 279; People *v.* Bradley, 36 Mich. 447; Cooley Const. Lim. 146; contra, Ryerson *v.* Utley, 16 Mich. 269; Stewart *v.* Father Matthew Society, 41 Mich. 67; People *v.* Donahy, 20 Mich. 349.

E. J. Bissell, E. H. Sellers, and F. A. Baker, for appellants. A petition for the condemnation of land must allege the petitioner's incivility to require title. Chic. and Mich. L. S. R. R. *v.* Sanford, 23 Mich. 418. The wife of the owner in fee must be made a party. State *v.* Easton, etc., R. R., 36 N. J. L. 184; contra, Moore *v.* Mayor, 8 N. Y. 110, Gwynne *v.* Cincinnati, 3 Ohio, 24. A tenant from year to year is a party in interest. Parks *v.* Boston, 15 Pick. 198; Lawrence *v.* Boston, 119 Mass. 126; North Pennsylvania R. R. *v.* Davis, 26 Penn. St. 238; Turnpike *v.* Brosi, 22 Penn. St. 29; Gilligan *v.* Providence, 11 R. I. 258. The petition must allege an attempt to agree with each respondent. In re Bost. Hoosac Tunnel and West. R. R., 79 N. Y. 71. Separate proceedings against

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each are inadmissible in Michigan. Grand Rapids and Ind. R. R. *v.* Alley, 34 Mich. 18; Mich. Air-Line Ry. *v.* Barnes, 40 Mich. 383. The petitioner cannot rely on negotiations conducted by a former company with which it had been consolidated. Harshman *v.* Bates County, 92 U. S. 569; County of Bates *v.* Winters, 97 U. S. 83. An express finding that it is necessary to take the land for the public use is required. Mansf., Coldw. and L. Mich. R. R. *v.* Clark, 23 Mich. 519; Grand Rapids and Ind. R. R. *v.* Van Driele, 24 Mich. 409. Improvements made on another's land without his consent become his property at common law, though the rule is modified where they were made in good faith: Parsons *v.* Moses, 16 Ia. 444; and equity required payment for them. Putnam *v.* Ritchie, 6 Paige, 390; Bright *v.* Boyd, 1 Story, 478; 2 id. 675; Story's Eq. Jur. 779 a, 799 c; Green *v.* Biddle, 8 Wh. 77; Willard's Eq. 312; Sugd. Vend. ch. 22, §§ 54, 55, 57. The value may be set off in an action for mesne profits. Jackson *v.* Loomis, 4 Cow. 168; Murray *v.* Governeur, 2 Johns. Cas. 438; Hilton *v.* Brown, 2 Wash. 165; Davis *v.* Smith, 5 Ga. 274; 2 Kent's Com. 335. But in Massachusetts payment cannot be recovered for improvements made under defective condemnation proceedings. Harris *v.* Marblehead, 10 Gray, 44; Crosby *v.* Dracut, 109 Mass. 206; Spalding *v.* Chelmsford, 117 Mass. 393. Good faith is essential to a recovery under betterment laws. Horton *v.* Sledge, 29 Ala. 498; Ormond *v.* Martin, 37 Ala. 606; Pope *v.* Mason, 23 Ark. 644; Merlow *v.* Adams, 24 Ark. 109; Carpenter *v.* Mitchell, 29 Cal. 335; Love *v.* Shartzer, 31 Cal. 495; Carpenter *v.* Small, 35 Cal. 346; Armstrong *v.* Jackson, 1 Blackf. 374; Ross *v.* Irving, 14 Ill. 171; Montag *v.* Linn, 27 Ill. 328; Childs *v.* Shower, 18 Ia. 267; Patrick *v.* Marshall, 2 Bibb, 44; Krause *v.* Means, 12 Kan. 338; Gibson *v.* Hutchins, 12 La. Ann. 545; Russel *v.* Blake, 2 Pick. 507; Plimpton *v.* Plimpton, 12 Cush. 467; Dothage *v.* Stuart, 35 Mo. 251; Fenwick *v.* Gill, 38 Mo. 510; Strike *v.* McDonald, 2 Harr. & Gill. 191; Madland *v.* Beuland, 24 Minn. 379; Withington *v.* Corey, 2 N. H. 118; Bailey *v.* Hastings, 15 N. H. 529; Bellows *v.* Copp, 20 N. H. 504; Frear *v.* Hardenburgh, 5 Johns. 278; Jackson *v.* Loomis, 4 Cow. 172; Woodhull *v.* Rosenthal, 61 N. Y. 396; Longworth *v.* Wolfington, 6 Ohio, 10; Taylor *v.* Foster, 22 Ohio St. 267; McCoy *v.* Grandy, 3 Ohio St. 463; Morrison *v.* Robinson, 31 Penn. St. 456; Nelson *v.* Allen, 1 Yerg. 376; McKinly *v.* Halliday, 10 Yerg. 477; Mathews *v.* Davis, 6 Humph. 324; Saunders *v.* Wilson, 19 Tex. 194; Howard *v.* Rocheson, 13 Tex. 553; Thouvenin *v.* Lea, 26 Tex. 612; Brown *v.* Storm, 4 Vt. 42; Whitney *v.* Richardson, 31 Vt. 306; Thompson *v.* Gilman, 12 Vt. 109; McKim *v.* Moody, 1 Rand. 58; Pacquette *v.* Pickness, 19 Wis. 49; Bank of Hamilton *v.* Dudley, 2 Pet. 526; Society *v.* Wheeler, 2 Gall. 137; Albee *v.* May, 2 Paine, 74. Where the improvements are not made in good faith they belong to the

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owner of the land. Dietrich *v.* Murdoch, 42 Mo. (1868) 279; Miss. and Tenn. R. R. *v.* Devaney, 42 Miss. (1869) 555; Graham *v.* Connorsville, etc., R. R., 36 Ind. (1871) 463; Cal. P. R. R. *v.* Armstrong, 46 Cal. (1873) 85; United States *v.* Land in Monterey County, 47 Cal. (1874) 515; Emerson *v.* Western Union R. R., 75 Ill. (1874) 175; In re Long Island R. R., 6 N. Y. Sup. Ct. (1875) 298; Justice *v.* Nesquehoning Valley R. R., 87 Penn. St. (1878) 28.

CAMPBELL, J.—This is an appeal from proceedings to condemn lands. The property involved is the same included in the proceedings set aside at the June term, 1881, in the case of Dunlap *v.* Toledo, Ann Arbor and North-eastern Ry. Co. The present company purports to be a consolidation of the last-named company with the Toledo and Ann Arbor R. R. Co.

It appears that immediately after the confirmation of the proceedings which were afterwards set aside by this court, the company took possession of Dunlap's land and built its road across the part sought to be condemned. This was done in December, 1880, and led to a series of legal controversies not yet determined.

The present proceedings were begun on the 18th day of June, 1881, by the presentation of a petition to the Circuit Court for the County of Oakland, where a jury was drawn and subsequently rendered the verdict complained of. During the pending of the proceedings, and subsequently, certain orders were made by the Circuit Court, to which reference will be made hereafter.

Some important questions arose, which require a brief preliminary reference to the nature of these proceedings. The statute is evidently framed in accordance with the laws of some other States where the judicial power is not parcelled out as it is here; and some complications have been caused by this practice which introduce difficulties. We had occasion, in the case of Michigan Air-Line Ry. *v.* Barnes, 44 Mich. R. 222, to point out some of these difficulties. It is greatly to be regretted that this species of legislation has been so very carelessly framed.

In the present case some steps appear which could only have been taken by a court in the regular exercise of judicial power, while others belong to a different class of functions entirely, and are governed by different considerations.

Under our constitution such powers as are strictly judicial in their character can only be vested in certain courts which are named in the constitution itself.

The circuit courts, as courts, have such powers. The judges, as judges, out of court, do not possess them, and cannot be vested with them.

The proceedings to condemn lands, although made under the railroad laws subject to judicial review and supervision for certain

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purposes, are not in themselves, and never have been regarded as judicial proceedings. Our constitution allows them to be conducted by highway commissioners in some cases, and by specially appointed commissioners or juries of freeholders.

The inquiry in this State, as elsewhere, is an appraisal or estimate of values, and not a contest on litigious rights, and includes what is not elsewhere included, an inquiry into the necessity of the proposed taking for public purposes, which was never made by courts, but always heretofore by the Legislature or some unjudicial body of its creation. Had it not been for the specific provisions in our constitution the State could have provided for these inquiries to be made by any medium it might select. People ex rel. Green v. Mich. Southern R. R. Co., 3 Mich. 496. Our present system is better calculated than the old one, if fairly applied, to secure the rights of land owners. But the nature of the proceeding remains as before, a special proceeding by a temporary tribunal selected for the occasion, and not a judicial proceeding in the ordinary sense.

As provided for under the railroad laws, there are certain proceedings in court to select a jury, and subsequent proceedings to determine whether the action of the jury should be sustained. Beyond this the courts have no part in the matter, and with the exception of some special matters to be referred to hereafter no difficulties should have arisen to confound these functions. But it is manifest they have been confounded to some extent here, and the question may arise how far such confusion may have caused mischief which we can redress.

It may be said in brief, that if a jury has been summoned under proper circumstances, has conducted its inquiries legally, and with due regard to private rights, and has reached a legitimate conclusion as to the necessity of the condemnation and the compensation, the appropriation of the land upon payment of that compensation will be lawful, and will not be affected by collateral action by the judge or court, which may be unlawful. This distinction between the different tribunals is essential.

The objections taken may be divided into two classes, the one relating to the sufficiency of the condemnation, and the second to the action of the court or judge independent of the inquest. Reference will first be made to the latter.

These are, first, action taken by the circuit court to restrain legal proceedings; second, action concerning certain moneys, and third, action requiring the land owners to pay costs.

On the 25th of July, 1881, the circuit judge, upon an ex parte application, which seems to have been presented and treated as a part of this proceeding, made an order restraining a suit at law between Dunlap and several private parties, as well as the railway company, for trespass—a chancery suit, involving a bill and cross-bill between the company and Dunlap, and between Dunlap and

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the company and two private persons, and a proceeding in favor of Erwin D. Brooks before a circuit court commissioner, for forcible entry and detainer. The same order authorized the company to draw certain money from a bank, in which we do not see that appellants here had any special concern.

Without stopping to consider the very serious question whether a judge can be authorized, in a proceeding which is not a suit in court, to interfere with regular legal proceedings, pending in the ordinary course of justice, it is sufficient to say that ex parte action for that purpose, where the parties interested have neither notice beforehand nor any regular means of relief against it, cannot be sustained on any principle whatever. We do not think any such summary and illegal proceeding was intended by the legislature. It is very questionable how far the statute contemplates any such interference, except through the medium of a distinct legal proceeding; but it does not authorize any action except by the court, and it could not lawfully authorize it without a hearing, and was not intended to do so.

Upon the matter of costs there is also reason to regard it as a serious question whether, inasmuch as the necessity of taking as well as the amount of compensation must be determined before land can be taken, a land owner can, under any circumstances, be compelled to lose his land without full compensation. He cannot be compelled to determine, at his peril, whether a jury will regard the land as necessary for public use, and he cannot be in fault for refusing a tender when he can have no assurance that the proposed improvement will be sanctioned. But the statute is fatally defective if such an infliction could be imposed, because it provides no means and no tribunal for determining the question of tender. It is not within the constitutional functions of the jury, and the judge, whether present or absent, cannot pass upon such a fact himself and bind the party by it. The law has provided no method of inquiry for deciding this question legally.

In regard to the deposit of money in bank, the statute has no provision which would compel the land owner to take the risk of any such deposit, or deprive him of his rights until he is paid. We do not regard him, therefore, as injured by the mere deposit of the money.

The remaining questions relate to the action of the jury, and the orders which provided for their appointment.

It is claimed that there is no authority to take such steps in favor of a consolidated company, consisting in part of a foreign corporation, and that the railroad law itself is invalid for a defective title.

The act is entitled "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroad

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and other corporations owning or operating any railroad in this State."

It does not appear to us that this title covers more than one object. It is to bring together the legislation concerning the creation and management of railroads. It may be that there are some roads which are exempt from more or less of its provisions, and that as to them it could not be enforced. But this would be for other reasons, and not because the title is double.

Neither do we think the consolidation presents any difficulty. The new organization, as such, is undoubtedly a Michigan Corporation. How far, as such, it could act abroad does not matter here. It possesses the powers belonging to that particular corporation, which had authority before the union to institute proceedings to reach this particular land, and this is all that is now under inquiry. We have no occasion to look further.

It also appears that James M. Dunlap is the owner in fee of the lands sought to be taken, and that the rights of the other parties are a contingent dower interest, and a tenancy at will. Without obtaining Dunlap's authority, the company could have had no rights of control over the land by any license or grant from the rest. This being so, a failure to agree with him was as complete a bar to possession and enjoyment for their railroad as a refusal of all three to agree. The statute contemplates that these proceedings may be had if the land cannot be obtained by treaty, and here it was shown it could not be.

We are of opinion that no error was committed in excluding from the compensation allowed to Dunlap the value of the railroad track laid upon the land. We think the case cannot be distinguished from Morgan's Appeal, 39 Mich. 675. The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railway track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely and left the track untouched, we think that so long as it is in possession and legal measures are proceeding to secure a right to retain it there, this structure belongs to the company, whether intruders or not.

The remaining errors assigned refer to various rulings and tes-

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timony bearing upon the question of public necessity. Some of them have been raised on what is a mistaken notion of the character of these proceedings. The circuit judge attended the sittings of the jury, and admitted or excluded testimony, and charged the jury precisely as on a trial.

The judge formed no part of this special tribunal. The statute indeed allows the judge "to attend said jury, decide questions of law, and administer oaths to witnesses," § 21, Art. 2. But the same statute which allows this allows him to designate a circuit court commissioner for the same purpose, and also allows the jury to proceed without either. Whatever the language of this statute literally construed may mean, it is very clear that any such functions must at most be advisory. The jury will undoubtedly be regarded as accepting and doing what they permit to be done. But in all such cases the constitution as well as the principles of the common law makes them judges of law and fact. Chamberlain *v.* Brown, 2 Doug. 120. Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion. And while an appellate court is bound in such cases to set aside proceedings which appear to be based on false principles, it cannot properly deal with rulings as if they were excepted to on a common law trial, or dispose of the controversy on merely technical notions. Chamberlain *v.* Brown, 2 Doug. 120; Michigan Air Line R. R. Co. *v.* Barnes, 44 Mich. 222.

In the case before us the jury have in proper form decided the improvement to be one of public necessity. They had a considerable amount of testimony before them bearing on that question, and it was strongly contested. While the language of the charge of the judge is certainly ambiguous and open to criticism, yet it appears distinctly that the jury regarded not merely the necessity of the land if the road should be laid out, but also the importance of the road itself. We cannot say from an inspection of the record that there is any prevailing reason for holding that the jury were misled in their conclusions.

Neither do we discover any sufficient reason for holding there has been anything out of the way in the estimate of damages. There is some ground for questioning their entire adequacy, but the jury saw the land and heard the witnesses, and as the case stands we cannot disturb their finding on this point. That objection is not raised on the record, and does not appear to have come up at all except as to the materials of the superstructure.

There is nothing, however, in the record which in our opinion entitled the company to costs, and we think costs should be awarded to Dunlap. The proceedings below, so far as they relate to the findings of the jury, must be affirmed. The remaining orders and

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proceedings are unauthorized and must be reversed, with costs of this court and of the proceedings below to the appellant Dunlap.

The other justices concurred.

Decisions relative to the assessment of damages for land taken by virtue of the exercise of the right of eminent domain are apt to be of little value as precedents outside the limits of the State in which they are made. Depending as they usually do upon the construction and interpretation of local statutes, they are rarely of such a character as to attract or merit attention in localities where those statutes are not in force. Occasionally, however, a case occurs upon this topic which constitutes an exception to the general rule and which is of interest and importance to the profession at large, because it passes upon some great questions or principles common to all the States in the union. Such a case is the one to which the present note is appended. Many of the authorities bearing upon the questions involved will be found to be cited by counsel in arguendo and need not here be repeated. An attempt will, however, be made to discuss the various points raised at some little length and to cite such additional authorities, passim, as will enable the inquiring reader to make himself familiar with the general principles governing any of these points to which he may choose to direct his studies.

1. It is somewhat difficult to understand precisely what is meant by the court in saying that the judges of the courts, as judges, and not as the court, can exercise no judicial powers. It would seem that a judge acting as a judge acts a court. It is the frequent custom in England and in most of our States for parties to obtain and for judges to grant orders of various sorts in Chambers. Yet the regularity of such orders as judicial proceedings has never been doubted. The action of the judge, in the present case, in making the orders ex parte purely was perhaps reprehensible. But if it was within the scope of the power of the court in which he sat to make such orders, serious doubt may be entertained as to whether his individual action was wholly void as a judicial act. The only reasonable ground upon which such a position can be supported is that taken in the latter part of the opinion, viz., that the act fixing the method of appropriating land for railroads did not contemplate or authorize any such summary interference.

2. The Michigan method of assessing damages for lands taken by railroad companies is somewhat peculiar, but strictly in accordance with constitutional principles. The Legislature is the body in whom the right of eminent domain is primarily reposed. It is for them to say when that right shall be exercised. They must, however, provide some competent and unbiassed tribunal before which the owner of the property taken may prove and recover the damage which he has sustained.

Bonaparte *v.* Camden and A. R. R., Baldw. 205; People *v.* Smith, 21 N. Y. 595; Springfield R. R. *v.* Hall, 67 Ill. 99; Cunningham *v.* Campbell, 33 Ga. 625; Cox *v.* Cummings, 33 Ga. 549; Kramer *v.* Cleveland R. R., 5 Ohio St. 140; Ames *v.* Lake Superior R. R., 21 Minn. 241.

This tribunal need not be the common law jury of twelve men, but may be constituted precisely as the Legislature sees fit, and vested with whatever authority the Legislature deems appropriate.

Evansville R. R. *v.* Miller, 30 Md. 209; Scudder *v.* Trenton Falls Co., 1 N. J. Eq. 694; Houston R. R. *v.* Milburn, 34 Tex. 224; Hagnoman *v.* Blake, 19 Cal. 579; Dalton *v.* Northampton, 19 N. H. 362; In re Paschall St., 81 Pa. 118; Norristown Turnpike *v.* Burket, 26 Md. 53.

And when such a tribunal is constituted resort can be had to it alone for the recovery of damages, its jurisdiction being absolutely exclusive.

Stevens *v.* Middlesex, 12 Mass. 466; Spring *v.* Russell, 7 Me. 273; Mason *v.* Kennebec R. R., 30 Me. 215; Henniker *v.* Contoocook R. R. Co., 29 N. H.

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146; Koch v. Williamsport Co., 65 Pa. 288; McIntire v. West. R. R. Co., 67 N. C. 278; Smith v. Chicago R. R. Co., 67 Ill. 191; Lindell's Admr. v. Hannibal and S. Joseph R. R., 86 Mo. 548; Boomby v. Androscoggin and K. R. Co., 51 Me. 318; Vt. Cent. R. R. Co. v. Baxter, 22 Vt. 365; Clark v. Boston, C. & M. R. Co., 24 N. H. 114; Orr v. Grumby, 54 N. H. 290; Perley v. Boston, C. & M. R. Co., 37 N. H. 212; W. & B. R. Co. v. Williams, 54 Pa. St. 103; Fehr v. Schuylkill Nav. Co., 69 Pa. St. 161; Balt. & P. R. Co. v. Magruder, 34 Mo. 79; Kennedy v. M. & St. P. R. Co., 22 Wis. 581; Sherman v. Mil., L. S. & W. R. Co., 40 Wis. 645; Daniels v. Chicago R. R. Co., 35 Iowa, 129. But as will be seen by reference to the opinion in the principal case and to compiled laws of Michigan (1871), vol. 1, p. 755, et seq., the peculiar tribunal constituted in Michigan for this purpose is invested with another and most unusual power, viz., the power of deciding whether under the circumstances of the case there is such a necessity for the proposed taking as will authorize the exercise of the right of eminent domain. This is a power which the Legislature usually exercises itself. That it may delegate it seems very clear.

3. The proceedings of the tribunal constituted to assess damages for lands taken are usually reviewable either by appeal or certiorari, not in equity or by a writ of error.

Hamilton v. Annapolis R. R., 1 Mich. 107; Evans v. Halfner, 29 Mo. 141; Ney v. Swinney, 36 Md. 454; Galena R. R. v. Pound, 22 Ill. 399; Henline v. People, 81 Ill. 269. The respective functions of the appeal and of the certiorari differ materially in different States. In some the cause on appeal is tried before a jury of twelve men, in others it is simple heard by a court who have power to correct errors of law and to increase or diminish the damages awarded. State v. Hulick, 33 N. J. L. 307; Fitchburg R. R. v. Boston R. R., 3 Cush. 58; Delaware R. R. v. Burston, 61 Pa. St. 369; Johnston v. Rankin, 70 N. C. 550.

In some States an appeal is substantially the same thing as a certiorari which simply brings up the record, the appellate tribunal being able to review only such irregularities as appear upon its face with regard to the way in which the proceedings have been carried on.

People v. Canal Board, 7 Lans. 220; People v. Town of Seward, 27 Barb. 94; N. J. R. R. v. Suydam, 17 N. J. L. 25; Kroop v. Thomas, 31 Mich. 144.

And it is to be remarked that if the record shows that the proceedings are substantially correct, the court will not reverse on account of trifling irregularities.

In re Tucker's Petition, 27 N. H. 405; Cambridge v. Co. Comm. of Middlesex, 117 Mass. 79; State v. Smith, 21 N. J. L. 91; New Haven Co. v. Northampton, 102 Mass. 116; In re Inhabitants of Vasselborough, 19 Me. 338; Road Comm. v. Fockinger, 51 Pa. 48.

4. The provisions of the Michigan act clearly intend to give to the land holder a right to have a competent tribunal pass upon the question whether there is a necessity to take his land or not. This is a pure question of fact outside of the landholder's knowledge and which it is impossible for him to have any information about until it is decided by the appropriate tribunal. How, then, can he be in fault in refusing a tender of the value of his land before such decision? He knows not, he cannot know, whether any right to damages will ever vest in him. The same observations are true as regards the failure of the landholder to take the risk of a deposit made by the railroad company before the rendering of the decision as to the necessity of taking his land. The refusal of the court to assess the costs upon the petition on these grounds was clearly right.

5. Many of the States have of late introduced provisions into their constitutions forbidding their legislatures to pass acts, the full purport of which is not set forth in their titles. Some prohibit the passage of all acts compre-

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hending more than one subject. See the constitutions of Michigan, New York, Ohio, Pennsylvania, Minnesota, Maryland, Kansas, Kentucky, Nebraska, Louisiana, Texas, South Carolina, Alabama, Missouri, Indiana, Illinois, Wisconsin, New Jersey, and Virginia. The purpose of these provisions is clearly set forth in the following passage from the opinion in People v. McCann, 3 Park Co. R. 299.

"Instances had occurred in which important enactments had been smuggled through the legislature under the cover of some bill with a modest and unpretending title. To guard the legislature as well as the public against this kind of imposition, the framers of the constitution adopted the above provision."

It is neither appropriate nor practicable to discuss at length here the authorities on this point. The following are some of the principal cases, and to them the reader is referred for full information on the subject: Mayor v. Colgate, 2 Kem. 146; Sun Mutual Ins. Co. v. Mayor, 8 N. Y. 253; People v. Hills, 35 N. Y. 425; People v. O'Brien, 38 N. Y. 195; People v. Comm., 53 Barb. 70; People v. Mahany, 13 Mich. 494; Smith v. Mayor, 34 How. Pr. 508; People v. Stevens, 2 Abb. Pr. 348; Matter of Tappan, 36 How. Pr. 390; Burnam v. Acton, 4 Abb. Pr. 1; People v. McCann, 16 N. Y. 60; DeWitt v. San Francisco, 2 Cal. 289; Pierpont v. Crouch, 10 Cal. 315; Martin v. Broach, 6 Ga. 21; Prothro v. Orr, 12 Ga. 36; Robinson v. Bank, 18 Ga. 65; Hill v. Commissioners, 22 Ga. 203; Davis v. Bank of Fulton, 31 Ga. 69; O'Leary v. Cook, 28 Ill. 534; People v. Mellen, 32 Ill. 181; Madison, etc., R. R. Co. v. Whiteneck, 8 Ind. 217; Mewherter v. Price, 11 Ind. 199; Reilly v. Ellsworth, Id. 222; Reed v. State, 12 Ind. 641; Igoe v. State, 14 Ind. 239; Kuhns v. Krammis, 22 Ind. 107; Central Plank R. R. Co. v. Hannaman, 22 Ind. 481; Wheeler v. Calvert, 25 Ind. 365; Green v. Indianapolis, 25 Ind. 490; Bright v. McCullough, 27 Ind. 223; McAunich v. Miss., etc., R. R. Co., 20 Iowa, 338; Porter v. Thomson, 22 Iowa, 391; Chiles v. Drake, 2 Metc. (Ky.) 146; Louisville R. R. Co. v. Ballard, Id. 165; Johnson v. Higgins, 3 Id. 566; Gibson v. Belcher, 1 Bush. (Ky.) 145; State v. Harrison, 11 La. Ann. 297; Wallace v. Smith, 8 La. Ann. 376; Kathman v. New Orleans, 11 La. Ann. 145; Bossier v. Steele, 13 La. Ann. 433; State v. Henry, 15 La. Ann. 297; Parkinson v. State, 14 Ind. 184; Tuttle v. Strout, 7 Minn. 465; St. Louis v. Tiefel, 42 Mo. 578; State v. Elvins, 32 N. J. Law, 362; Pim v. Nicholson, 6 Ohio St. 176; Commonwealth v. Green, 58 Pa. St. 226; Cannon v. Hemphill, 7 Tex. 184; Robinson v. State, 15 Tex. 311; Commonwealth v. Drewry, 15 Gratt. 1.

6. On the subject of the rights of consolidated railroad companies, much information will be found in an elaborate brief by Charles W. Hassler, Esq., of New York, in the case of Dimpfel v. Ohio & Miss. Ry. Co., argued in 1879, before the U. S. C. C. for the Southern District of New York.

Much, of course, depends on the particular words of the various acts in question. The general principle may be adduced, that corporations of different States, when consolidated by virtue of acts of the respective legislatures which have called them into being, have in each State precisely the powers possessed by the single corporation created by that State, no more and no less, unless other powers are expressly conferred by the act of that State authorizing the consolidation. On this point the following authorities may be consulted: P., W. & B. R. R. Co. v. Maryland, 10 How. 375; Delaware R. R. Tax Case, 18 Wall. 206; Tomlinson v. Branch, 15 Wall. 460; R. R. Co. v. Harris, 12 Wall. 65; Ry. Co. v. Vance, 96 U. S. 450; O. & M. R. R. Co. v. Wheeler, 1 Black, 286; Ohio v. Shearman, 22 Ohio St. 412; Muller v. Daws, 94 U. S. 407; Butler's Appeal, 73 Penn. St. 448; Att'y-Gen. v. Boston and Maine R. R. Co., 109 Mass. 99; Thompson v. Waters, 25 Mich. 214; Shearman v. Ohio, 22 Ohio St. 411.

7. It is, undoubtedly, the general principle that where land is taken by

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virtue of the right of eminent domain, all persons having any interest therein are entitled to be made parties to the proceedings, and to be compensated in damages. But a married woman is not entitled in right of her dower interest in her husband's land to compensation in cases where such land is taken during her husband's life. Moore *v.* Mayor of N. Y., 8 N. Y. 110; Gywnne *v.* Cincinnati, 8 Ohio, 24. But see State *v.* Easton R. R., 36 N. J. L. 181.

Where, however, the right of dower is consummate and the widow has entered upon certain land which has been apportioned to her, then in case of the taking of such land she is entitled to damages for her interest therein. Williams *v.* Anthony Sts., 19 Wend. 679; Todemier *v.* Aspinwall, 43 Ill. 401.

The usual proceeding in such cases is to pay the whole value of the land to the owner, subject to the dower right, who then pays to the widow the sum to which she is entitled.

Remaindermen are parties having such an interest in the land taken as entitles them to be joined in the proceedings and to be compensated for the property taken. The railroad company, in such cases, usually pays the sum fixed as the total damages into court; it is then divided by the court in proper proportion between the various parties in interest.

Austin *v.* Rutland R. R., 45 Vt. 215; R. R. *v.* Boyer, 13 Pa. St. 497; Colcough *v.* Nashville R. R., 2 Head. 171; Crangle *v.* Harrisburg, 1 P. & W. (Pa.) 132; In re Philip's Trust, L. R., 6 Eq. 250; In re Pfleger, L. R., 6 Eq. 426; Shelton *v.* Derby, 27 Conn. 414.

Central Branch Union Pacific R. R. Co.

v.

Atchison, Topeka, and Santa Fe R. R. Co.

(*Advance Case, Kansas. November 14th*, 1881.)

The Atchison, Topeka and Santa Fe R. R. Co. having completed the line of road authorized by its charter, and having once condemned land in the city of Atchison for depots, side-tracks, etc., and needed more room in said city for the transaction of its business, instituted proceedings for condemning more land. *Held*, that such proceedings could be maintained, and that under the statute the right of eminent domain was not terminated by the completion of the road or exhausted by a single exercise of the power.

Notwithstanding the fact that the Atchison, Topeka and Santa Fe R. R. Co. was organized under a special charter of the Territorial Legislature it has a right to proceed for the condemnation of lands in accordance with the provisions of the general statutes in respect thereto.

Everest and Waggener for plaintiff in error.

By the provisions of the Act of Congress, approved March 3d, 1863, granting lands to the State of Kansas to aid in the construction of railroads, defendant company was required to complete its road within ten years from the passage of the act. 12 U. S. Statutes at Large, sec. 4, p. 775.

The State accepted this trust and granted the lands to defendant company. Chapter 84, Compiled Laws 1879, p. 774.

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Defendant company accepted this grant and thereby became bound by its provisions as to the time of completing its road.

Under the provisions of its charter, section 10, it is only in cases where the owner refuses to agree upon terms that application can be had to the court for the appointment of three commissioners to appraise the damages (section 10, chapter 47, page 59, Private Laws 1859), and that under this provision the court can only get jurisdiction in cases where the land cannot be obtained by purchase, or where there is a failure to agree on terms. Spofford *v.* R. R. Co., 66 Me. on pages 41–44; Ellis *v.* R. R. Co., 51 Mo. 200; R. R. Co. *v.* Sanford, 23 Mich. 418; Leslie *v.* St. Louis, 47 Mo. 474; Cunningham *v.* R. R. Co., 61 Mo. 33; Dyckman *v.* Mayor, 5 N. Y. 434.

Under the provisions of its charter, section 10, defendant company was required to give notice in the manner and at the time there pointed out that it would make application to the court for the appointment of commissioners to appraise the damages to the lands required for the purposes of its road. This is a necessary prerequisite to the proceedings and without which the proceedings would be void. R. R. Co. *v.* Smith, 78 Ill. 96; In matter of R. R. Co., 62 Barb. 85; Morgan *v.* R. R. Co., 36 Mich. 428; Lohman *v.* R. R. Co., 18 Minn. 174; R. R. Co. *v.* County Commissioners, 51 Me. 36; Conger *v.* R. R. Co., 12 N. Y. 190; R. R. Co. *v.* Nortop, 12 Abbott's (N. S.), 317; R. R. Co. *v.* Frederick, 46 Miss. 1.

The proceedings of defendant company to acquire lands by condemnation proceedings must be had under its charter and not under the general laws. Visscher *v.* R. R. Co., 15 Barb. 37, on pages 43 et seq.; R. R. Co. *v.* Outwater, 3 Sandford (S. C.), 689.

Defendant company, under its charter, could only condemn lands in cases where there was failure to purchase or agree. R. R. Co. *v.* Navigation Co., 3 Oregon, 178; R. R. Co. *v.* Moss, 23 Cal. 324; Gilmer *v.* Lime Point, 19 Cal. 47; R. R. Co. *v.* Water Co., 36 Cal. 639, on page 646; Gilbert *v.* Columbia, etc., Co., 3 Johnson Cases, 108.

Defendant company, according to law, had exhausted its power conferred by its charter; that injunction was the proper proceeding to restrain its acts. Cox *v.* R. R. Co., 48 Ind. 1878; R. R. Co. *v.* Menk, 4 Neb. 21; Ray *v.* R. R. Co., 4 Neb. 439.

The restraining order should have been continued until final hearing. Dryden's Case, 11 Kansas, 186.

On a motion to dissolve the injunction the subject matter of the controversy should not be determined. Certainly in a matter of so much importance as the case at bar, the court should only have settled the question whether or not the injunction should have been dissolved. Henderson *v.* Marcell, 1 Kansas, 137.

The protection sought by the plaintiff against the unlawful acts of the defendant could not have been available by appeal, as this

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court has frequently decided that the object of an appellate proceeding in this class of cases is simply to correct the assessment of the commissioners. Wilder's Case, 17 Kansas, 239; Moore's Case, 24 Kansas, 323, on page 328.

By appealing from the assessment of the commissioners, other remedies would have been waived. Reasoner's Case, 24 Kansas, 410.

Injunction is the proper remedy to contest the right of the defendant company to take land in controversy. Reasoner's Case, 24 Kansas, 410; Field on Corporation, Sec. 494; 11 Ohio St. 228; 17 Ohio, 340; 8 Kansas, 410.

Geo. R. Peck, A. A. Hurd, Tomlinson & Griffin, attorneys for defendant in error, cited: Fall River Iron Works *v.* R. R. Co., 5 Allen, 221; Hentz *v.* Long Island R. R. Co., 13 Barb. 646; South Carolina R. R. *v.* Blake, 9 Rich. L. 228; Manhattan Co., ex parte, 22 Wend. 653; Cottun *v.* Bosen Co., 22 Minn. 372; N. Y. R. R. *v.* Young, 33 Pa. 175; Panks' Appeal, 64 Pa. 137; Stank *v.* Sioux City R. R., 43 Iowa, 501; Chicago, B. & Q. R. R. Co. *v.* Wilson, 17 Ill. 127; Virginia R. R. Co. *v.* Lovejoy, 8 Nev. 100; Kip *v.* R. R. Co., 46 N. Y. 546; Mills on Eminent Domain, sec. 59; R. R. Co. *v.* McLanahan, 59 Pa. 23; R. R. Co. *v.* Gas-Light Co., 63 N. Y. 326; R. R. Co. *v.* Speer, 56 Pa. 325; R. R. Co. *v.* Devaney, 42 Miss. 555; Hamilton *v.* R. R. Co., 1 Md. 553; R. R. Co. *v.* Childs, 33 N. J. L. 323; N. Y. R. R. Co. *v.* Metropolitan Gas-Light Co., 63 N. Y. 326; R. R. Co. *v.* R. R. Co., 66 Ill. 174; Oregon R. R. Co. *v.* Bailey, 3 Oreg. 164; Hann. R. R. Co. *v.* Hann. R. R. Co., 81 Ill. 523; Rochester Water Comm. Case, 66 N. Y. 413; Kip *v.* R. R. Co., 67 N. Y. 227; Noll *v.* R. R. Co., 32 Iowa, 66; Toledo, etc., R. R. Co. *v.* Daniels, 16 Ohio St. 390.

BREWER, J.—On the 24th day of March, A.D. 1881, the defendant company applied to the district judge for the appointment of three commissioners for the purpose of laying off and condemning certain lands and town lots in the city of Atchison, being the property of the plaintiff, which application being presented on said day, the district judge appointed certain commissioners in pursuance to the request so made in defendant company's application. Thereafter the commissioners so appointed published notice that on the 27th day of April, A.D. 1881, they would meet to discharge the duties of such appointment. On April 25th the plaintiff presented and filed its petition in writing, duly verified, together with a bond and affidavits, and obtained an injunction against defendant company and said commissioners, restraining them from further action under such condemnation proceedings, which was duly served upon all the defendants. On April 30th defendant company filed its motion to dissolve said injunction. On May 14 said motion came on for hearing before the judge at Chambers, and affidavits and evidence were presented by the parties

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respectively, and the same was argued by counsel and taken under advisement by the court until May 18, 1881, at which date the court dissolved said injunction, and the plaintiff now brings the case here for review.

Two principal questions arise. The first is this: Years ago the defendant exercised the right of eminent domain, condemned land for its line of road and for terminal facilities at the city of Atchison, built depots, side-tracks, etc., at Atchison, and completed its entire line of road. Now the contention of plaintiff is, that, defendant's road being a completed road, and defendant having once exercised the right of eminent domain, its power in that respect is exhausted, and that without further legislative authority its right to take lands in invitum is lost. This question must be resolved by reference to the statutes; for that the legislature can give to railroad corporations a right of eminent domain as continuous as their necessities is not doubted. The sections of the statute providing for the exercise of this power are two in number, sections 81 and 87, pages 230, 231, Compiled Laws, 1879. Section 81 reads: "Any duly chartered and organized railway corporation may apply to the board of county commissioners of any county through which such corporation proposes to construct its road, to lay off, along the line of such proposed railroad, as located by such company, a route for such proposed railroad, not exceeding one hundred feet in width, except for the purposes of cuttings and embankments, it shall be necessary to take more for the proper construction and security of the road, through as much of said county as may be desired by such company; and also such land as may be deemed necessary for side-tracks, depots, and work-shops, and water stations, materials for construction, except timber, a right of way over adjacent lands sufficient to enable such company to construct and repair its road and stations, and a right to conduct water by aqueducts, and the right of making proper drains."

Section 87, as it stood originally in the laws of 1868, simply provided for the appointment of commissioners by the district judge, who were to make the assessment instead of the county commissioners; otherwise, and so far as any question involved in this case is concerned, the section was similar to section 81. In 1870 the section was changed to read as follows: "That any railway corporation, instead of applying to the board of county commissioners, as hereinbefore provided, or any person or persons through whose land or premises any railroad has been or is being constructed, may apply to the judge of the district court of the county through which any railroad is, or is to be built, for the appointment of three commissioners to make the appraisement and assessment of damages instead of the county commissioners; said commissioners shall be freeholders and residents of the county through which such railroad is, or is to be built. . . . Such commissioners shall be

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sworn to honestly and faithfully discharge their duties as such commissioners, and they shall do and perform all things in the manner, and under the same regulations and restrictions as are provided in case such duties were performed by the county commissioners, and the subsequent and other proceedings, including the appeal, shall be done and performed in the same manner; and the railroad company shall pay all costs accruing under any application under this section."

Now the argument of plaintiff is that section 81 refers alone to a proposed and not to a completed railroad, and that in the first instance the corporation must condemn, not only the land needed for its line of road, but also all that will be necessary in the future for its terminal facilities; or, failing to do that, must acquire the latter by voluntary purchase alone. It is urged that a grant like this being in derogation of private right must be strictly construed; that nothing passes by intendment or implication, and that only so far as the power to condemn lands is expressly granted can it be exercised by any corporation. All doubts are to be resolved against the grant, and in support of these views the cases are cited of Morehead *v.* R. R. Co., 17 Ohio, 340; M. & E. R. R. Co. *v.* C. R. R. Co., 31 N. J. L. 205. It is further urged that section 87 was simply intended to give to the land owner a right to initiate proceedings for the appraisement of his land taken by the company, and was not intended to give to the railroad company any increase of its right to condemn lands; or, secondly, that if it does give it a right to initiate proceedings after the completion of its line of road, it is a grant of power which, when once exercised, either before or after the completion of the road, is exhausted. On the other hand, it is contended that any limitation imposed by the phrase "proposed railroad" in section 81 applies only to the mere line of road; that that section gives authority to condemn such land for side-tracks, depots, etc., as may be necessary, which implies that it is to be condemned when it is in fact necessary, or deemed necessary, and therefore as often as it is deemed necessary, and that the true grammatical construction of this section makes a distinction between land for the right of way and land for depots, etc. It is further contended that while section 87 as it originally stood simply provided for other commissioners than the county board, the amendment in 1870 enlarged the power of the corporation in respect to this matter of eminent domain, and gave to it, both before and after the completion of its road, the right to condemn lands. The language of the section reads, "is or is to be built," and the right is given to the corporation, as well as to the land owner, to apply for commissioners, and the closing clause of the section which gives to these commissioners all the powers granted in section 81 grants the power of condemning land for depots, etc., after the completion of the road, and such land as may

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be deemed necessary therefor. And in support of these views the following cases are cited: T. & W. R. R. Co. v. Daniel, 16 Ohio St. 390; C. B. & Q. C. R. R. Co. v. Wilson, 17 Ill. 127; M. & T. R. R. Co. v. Devaney, 42 Miss. 555.

While the question may not be perfectly clear, we think the views expressed by the defendant are correct, and that its power of eminent domain was not, as respects land needed for terminal facilities, exhausted by a single exercise of the power either before or after the completion of the road. All legislation must be construed in the light of existing facts, and while a grant like this is doubtless to be strictly construed, yet such rule of construction does not forbid giving just and reasonable force to all the separate provisions of the statute, or prevent it being interpreted by the actual experiences and necessities of life. Now it is perfectly plain, whatever may be the true interpretation of section 81, that section 87 gives to a railroad corporation power to condemn lands after the completion of its road. Doubtless this embraces cases in which the corporation has in the first instance occupied lands without legal right, and seeks to perfect title thereto; but we think it also includes cases where the road having been completed the corporation, as here, needs enlarged terminal facilities. Section 87 refers to and partially adopts and incorporates section 81, and putting the two sections together, and writing out in one sentence a statement of the grant, so far as this question is concerned, it would read about thus: "Any railway corporation may apply to the judge of the district court of the county through which its road is or is to be built for the appointment of three commissioners to lay off a route for such road, and also such land as may be deemed necessary for side-tracks, depots, etc." Reading the grant in that way, it would seem that the power is given to condemn land for terminal facilities whenever deemed necessary, and that one exercise of the power did not exhaust it. Railroads, as all know, are things of growth; they enlarge with the development of the country. Starting as small enterprises, doing a trifling business, as the country develops they extend, their business expands, that which in the inception afforded ample facilities becomes inadequate for the increasing business, and the company stands between two difficulties. It must either imperfectly discharge its duties to the public and thereby expose itself to liability for damages, or enlarge its facilities, which, if it cannot be done by the power of eminent domain, will expose it to any exorbitant demands for land which business rivals or avaricious individuals may see fit to exact. The defendant's history fully illustrates this fact. It is but a few years since it commenced building its road. At first it was but a feeble corporation with but a few miles of track, and one whose business needed little rolling stock and very slight terminal facilities. Now it has become a gigantic corpora-

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tion owning hundreds of miles of road and part of a trans-continental line. Either in the infancy of the corporation the promoters must have had the foresight to anticipate its future development, and upon the first application condemn for its use all the lands at the various stations which such future development would ever require, or else it must stand now at the mercy of any rival or individual owning land at the place where its business necessities compel it to have more room. All this which is but a part of the common experience and history of the country must have been before the legislature at the time of these enactments, and such legislation must be interpreted in the light thereof.

Now is it not reasonable to suppose that it would legislate in harmony with rather than contrary to this law of railroad growth? Is it not more reasonable to believe that it intended to give the power to take such land as might be needed when it should be needed, and thus enable the company fairly and fully to discharge its duties to the public, rather than that it intended that in its inception the corporation should condemn an unreasonable and apparently unnecessary amount of land, or else be thereafter at the mercy of any who should happen to own land where its increasing business compelled it to have more room? It was well said by the Supreme Court of Illinois in the case cited from 17 Ill.: "We cannot suppose it was the intention of the legislature to oblige the company to acquire all the land in the first instance which in any event it should ever want, to do the largest amount of business it may ever hope to attain. The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility." It must be borne in mind that our railroad corporations are now organized under a general law, that a general law makes all the provisions for exercising the right of eminent domain. That no special charters and no special corporate powers are granted. The legislature in its enactments is not determining as to the necessities or probabilities of any particular road, but is laying down a general law for the regulation and control of all railroad companies. Such a general law should be in harmony with the experience of the country as to the necessities and growth of railroad corporations. Again, it may be fairly doubted whether in the first instance the road could condemn for depots, side-tracks, etc., any more land than its then prospect of business would adjudge necessary. It is given power to condemn as much land as may be "deemed necessary." Could it under this grant condemn any more land than was deemed necessary, and could any land be deemed necessary which was not in fact required for the company's present business and which would not be needed in the future except through some unexpected and rapid growth of the company's business? The Supreme Court of Ohio, in the case

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from 15 Ohio, supra, says: "The power to make 'necessary side-tracks,' prima facie, is the power to make them when they are necessary. Otherwise it would be the power to make unnecessary side-tracks. Prima facie, power to do any act is power to do it in such manner and at such time as is usual, convenient, and reasonable, in such way as prudent men manage their own cercerns." See in addition to authorities heretofore cited the following, which support the conclusions reached by us: Hamilton *v.* The Annapolis R. R., 1 Mo. 553; S. Car. R. R., ex parte, 2 Richardson, 434; S. Car. R. R. *v.* Blake, 9 Richardson, 229; R. R. Co. *v.* Lovejoy, 8 Nev. 100; R. R. Co. *v.* Speer, 56 Pa. St. 325. One other matter may be mentioned in this connection as strengthening the right of this particular defendant. It is one of the few corporations in the State created by special charter. This was granted by the territorial legislature of 1859, Special Laws 1859, page 57. Such special charter, section 3, provides that the company, "for the purposes of depots, side-tracks, may take more land, earth or material, as may be necessary for the construction, or completion, operation, preserving, maintaining said road," so that if this extra room is needed for the operation of the road, the company may under this section take it.

We do not rest our conclusions upon this section, however, but upon the provisions of the general law heretofore cited, and refer to this simply as strengthening the conclusions otherwise reached. The other principal question is this: The special charter above referred to made certain provisions for exercising the right of eminent domain. These proceedings differ slightly from the proceedings established by the general law; and the contention is that the company can proceed alone in accordance with the provisions of its charter, and cannot proceed under the general railroad law.

This is a mistake. The general railroad law applies to all corporations. Section 81 commences: "Any duly chartered and organized railway corporation," and section 87, "Any railway corporation." It does not refer simply to organizations organized under that statute, but includes all. No language could be used more general, more comprehensive. There is nothing in the nature of the thing to prevent a legislature from granting this power to corporations organized before the admission of the State and by special charter from the territorial legislature. If the company had no right of eminent domain given by its special charter, the State legislature could by general law endow it with such right, and if it had the right the legislature could by a similar law enlarge its modes of proceeding. The question simply is, whether a specially chartered corporation can avail itself of the general procedure established by law for all railway corporations, and that question must be answered in the affirmative.

These are the only questions we deem of importance in this

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case, and in them appearing no error in the rulings of the district court its order will be affirmed.

All the justices concurring.

The right of a railroad company to appropriate lands after the time set for completion has expired, has, as yet, no accepted rule, but varies in the different States. In the following cases it has been held that the power to take lands is limited by the expiration of the time as fixed by the charter, or is exhausted after the first use. Peavey *v.* Calais R. R. Co., 30 Me. 498; Mason *v.* Brooklyn, etc., R. R. Co., 35 Barb. 358; Brooklyn, etc., R. R. Co. *v.* Brooklyn, etc., R. R. Co., 32 Barb. 358; Hudson Canal Co. *v.* N. Y., etc., R. R. Co., 9 Paige, 323; Brooklyn, etc., R. R. Co., In re., 72 N. Y. 245; Morris, etc., R. R. Co. *v.* Central R. R. Co., 31 N. J. 205; Beck *v.* United, etc., R. R. Co., 39 N. J. 45; Atlantic, etc., R. R. Co. *v.* St Louis, 66 Mo. 228; Illinois, etc., R. R. Co. *v.* Rucker, 14 Ill. 353; Lodge *v.* Phila. R. R. Co., 8 Phila. 345; New York, etc., R. R. Co. *v.* Boston, etc., R. R. Co., 36 Conn. 196.

The following cases have held the power is continuous, and that the right of eminent domain may be exercised whenever the necessities of the road for increased accommodation demand it. Toledo, etc., R. R. Co. *v.* Daniels, 16 Ohio St. 390; Hamilton *v.* Annapolis R. R. Co., 1 Md. 553; Chicago, etc., R. R. Co. *v.* Wilson, 17 Ill. 123; South Carolina R. R. Co. *v.* Blake, 9 Rich. 228; Phila., etc., R. R. Co. *v.* Williams, 54 Pa. St. 103; Mississippi, etc., R. R. Co. *v.* Devaney, 42 Miss. 555; Virginia, etc., R. R. Co. *v.* Lovejoy, 8 Nev. 100; South Carolina R. R. Co., Ex parte, 2 Rich. 484.

In some States provision is made by statute for the subsequent exercise of power. Derby *v.* Framingham R. R. Co., 119 Mass. 516; New York, etc., R. R. Co., 11 In re, N. Y. Sup. Ct. 381; Rensselaer R. R. Co. *v.* Davis, 43 N. Y. 137.

See also Childs *v.* Central R. R. Co., 33 N. J. 323; Sadd *v.* Maldon Ry. Co., 20 L. J. 102; Stamps *v.* Birmingham Ry. Co., 17 L. J. 481; Prather *v.* Jeffersonville, etc., R. R. Co., 52 Ind. 16; Ticknesse *v.* Lancaster Canal Co., 4 M. & W. 472; Regina *v.* York, etc., Ry. Co., 16 Q. B. 886; Regina *v.* Lancashire, etc., Ry. Co., 20 L. J. Q. B. 507; Birmingham, etc., Ry. Co. *v.* Regina, 15 Q. B. 647; Salisbury *v.* Great Northern Ry. Co., 17 Q. B. 840; Seymour *v.* London, etc., Ry. Co., 5 Jur. N. S. 753; Rangeley *v.* Midland Ry. Co., 3 L. R. Ch. 306; Ystalyfera Iron Co. *v.* Neath, etc., Ry. Co., 17 L. R. Eq. 142; Bentley *v.* Rotherham, etc., 4 L. R. Ch. Div. 588; Regina *v.* London, etc., Ry. Co., 16 Q. B. N. S. 864.

JEFFERSONVILLE, MADISON, AND INDIANAPOLIS R. R. CO.

v.

OYLER.

(Advance Case, Supreme Court of Indiana.)

Where the owner of a tract of land conveys the same to a railroad company by which only a portion thereof is used, and the said owner remains in possession of the residue farming and improving the same, such possession will be deemed to be by permission of the company and not adverse to it. Hence it cannot be made available by a grantee of said owner in order to set up a title under the statute of limitations.

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A. being the owner of a tract of land conveyed the same to a railroad company by a deed which was not recorded. The company used but a portion of said land for their track, and A. remained in possession of the residue, farming and improving the same. Subsequently A. conveyed the portion of the land cultivated by him to B., who had no notice either express or constructive of the former conveyance, and who paid value therefor. *Held*, that B.'s title was good as against that of the railroad company.

The opinion in this case reported 60 Ind. 363, approved and followed.

The court will not reverse on account of the erroneous admission of evidence harmless to the appellant.

A writing coming from the proper custody, and which is more than thirty years old, proves itself, and may be admitted in evidence without proof of the handwriting of the person executing it. A fortiori, should it be admitted where there is such proof.

In tracing title to lands belonging to railroad companies, Marshall's deeds of railroads and articles of association and of consolidation of railroad companies are relevant and admissible evidence.

Objections to the admission of evidence based on slips in pleading which might have been corrected by amendment in the court below will on error be disregarded. The record will be viewed as though the amendment had been made.

APPEAL from the Johnson Circuit Court.

Came the parties by their attorneys, and the court, being sufficienty advised in the premises, gave the following opinion and judgment pronounced by

MORRIS, C.—The appellee brought this suit to quiet his title to a portion of lots sixteen, twenty, twenty-one, and twenty-three in Hamilton's and Oyler's addition to the city of Franklin, in Johnson County, Indiana.

The complaint alleges that the appellee is the owner in fee of said lot; that the track of the appellant's road crosses the western end of said lots; that the west line of said lot is the centre line of said road; that a portion of said lots not exceeding fifteen feet in width on the west end of the same is amply sufficient for the proper maintainance of the track of said road, and for the safe and secure passage of trains thereon; that for more than twenty years last past, and until the 21st of July, 1875, no greater portion than fifteen feet of the west end of said lots had been used or appropriated for the right of way across the same for railroad purposes; that the appellant is setting up a pretended title and claim to fifty feet in width on the west end of said lots, and that it had on the 21st of July, 1875, without the consent of the appellee, erected on said lots, at a distance of fifty feet from the centre line of its road, posts and a plank fence, thereby obstructing the appellee's use of said lots; that such acts create a cloud upon the appellee's title to the lots. The appellee prays that his title to said lots be quieted, and for two hundred dollars damages. To this complaint the appellant filed a counter claim, in which it is stated that one Garrett C. Bergen, being the owner of the north-east quarter of section fourteen, in township twelve, north, of range four, east, embracing the lots

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described in the complaint, on the 22d day of June, 1843, sealed, executed, and delivered to the Madison and Indianapolis R. R. Co., to whose rights the appellant has succeeded, release or conveyance of a strip of land one hundred feet in width, as the right of way for the road of said company for so much of said road as might or should pass through said quarter section of land.

That said road was finally constructed through said quarter section of land according to the survey, and on the centre line of said one hundred feet so conveyed to it by said Bergen. That said Madison and Indianapolis R. R. Co. took possession of said strip of land, and occupied and used the same until it consolidated with the Jeffersonville and Indianapolis R. R. Co. That the consolidated company, being the appellant, has ever since used and occupied the same; that the right of way so conveyed by said Bergen embraced and included that portion of the lots described in the complaint now in dispute. That said Bergen and wife, on the 8th day of November, 1865, conveyed a part of said quarter section to Robert Hamilton and the appellee, and that Hamilton afterwards conveyed to the appellee his interest in the lots described in the complaint, they being part of the land so conveyed by Bergen and wife to Hamilton and the appellee; that the only title of the appellee to said lots is derived from Bergen through his deed to him and Hamilton.

The appellee answered this counter-claim in three paragraphs. The first was a general denial, the second a denial under oath.

The third paragraph of the answer admits that, on June 22d, 1843, Garrett C. Bergen was the owner in fee of the north-east quarter of section fourteen, described in the counter-claim; that the Madison and Indianapolis R. R. Co., in 1847–48, located its road across said quarter section; that from that time until July, 1875, said company and its successors, in running and operating said road, over and through said quarter section, and particularly over that part of said land embraced by the lots described in the complaint, wholly abandoned any and all use, occupation, and claim to any part of the same, upon the east side of its railroad track, except so much as is included in a strip fifteen feet in width eastward from the centre track of said railroad, and did not, during said time, use or occupy any part of said land, except said strip fifteen feet in width on the east side of said centre line of said road.

That from 1850 until May, 1865, Bergen, with the full knowledge and consent of the Madison and Indianapolis R. R. Co. and its successors, and without objection, took and held exclusive possession of all of said quarter section which lies east of the centre line of said railroad, except said strip of fifteen feet in width; that he inclosed and farmed the same, and thereby excluded the railroad company from it. It is there stated that in May, 1866, Bergen and wife conveyed said land to Hamilton and the appellee, who took

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possession of the same, properly and legally laid off into city lots a portion of it as Hamilton's and Oyler's Addition of the City of Franklin; that said auditor included the lots named in the complaint; that Hamilton and Oyler occupied and held the exclusive and continuous possession of said land, to the exclusion of all other persons, until Hamilton conveyed his interest to the appellee; that he thereafter, and until the 21st day of July, 1875, held the exclusive possession of said premises, with the knowledge and consent of the appellant; that Bergen, Hamilton, and Oyler, and the appellee respectively held the possession of said premises, claiming the same respectively as their own against the appellant and all others; that on the 21st day of July, 1875, the appellant, without the consent of the appellee, entered upon said lots as stated in the complaint. It is averred that at the time Hamilton and the appellee purchased said land from Bergen, they had no knowledge that the appellant claimed, or pretended to have any title to, or interest in said land, except said strip of fifteen feet in width on the east side of said centre line of said railroad; that there was no conveyance or release from said Bergen to the Madison and Indianapolis R. R. Co., or its successor, recorded in said Johnson County or elsewhere in the State.

The appellant demurred to the third paragraph of the answer—to its construction. The demurrer was overruled. The cause was submitted to a jury for trial, and a verdict returned for the appellee. The appellant moved the court for a new trial; the motion was overruled and judgment rendered upon the verdict in favor of the appellee.

The rulings of the court upon the third paragraph of the answer to the cross-complaint, and upon the motion for a new trial, are assigned as errors.

A motion was made by the appellant to strike out a portion of the answer to the counter-claim, which was overruled by the court. The appellant does not mention the action of the court upon the motion in his brief. It will not, therefore, be further noticed.

The appellant insists that the demurrer to the third paragraph should have been sustained; that Bergen is alleged to have retained possession of the land in dispute, from the time he conveyed it to appellant as its grantor, until he conveyed to Hamilton and the appellee claiming and using the land as his own, and that Hamilton and the appellee have held the exclusive possession of the same adversely to the appellant. That the possession of Bergen, Hamilton, and the appellee has been continuous for more than twenty years. The appellant treats the answer as setting up the statute of limitations as a defence, and insists that, unless the possession of Bergen is shown to have been adverse to it, the answer regarded as a plea of the statute of limitations, is bad.

It is alleged in the cross-complaint that Bergen, while the owner

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of the land in dispute, conveyed it to the appellant. It is insisted, and correctly we think, that his possession of a part of the premises released to the appellant was not adverse to it. He will be deemed to have held subordinate, and not adverse, to the title of his grantee. Jackson *v.* Benton, 1 Wend. 341; Doe ex Marston *v.* Butler, 3 Wend. 149; Beach *v.* Catlin, 4 Day, 295; Higginson *v.* Meirer, 4 Cranch, 419; Rowe *v.* Lewis, 30 Ind. 154. We understand the case of Vanduyn *v.* Hepner et al., 45 Ind. 589, to be in substantial agreement with the above cases. We think the possession of Bergen, from the time he released the right of way to the railroad company, was not adverse to it or to its successors, but that he occupied the land in subordination to the rights of the company. As it appears by the answer that twenty years have not elapsed since Bergen conveyed to Hamilton and Oyler, it followed that if, upon the facts stated, Bergen is to be considered as holding in subordination to the title of his grantee, the Madison and Indianapolis R. R. Co. and its successors, the answer considered only as a plea of the statute of limitations is bad. As between Bergen and his grantee, the possession of the former will be deemed to be the possession of the latter. This rule, however, applies only as between the parties, and while it would prevent the running of the statute of limitation against the appellant during the occupancy of Bergen, a third person, dealing with Bergen for the land as the owner and occupant of it, would not be chargeable with notice of the relations existing between him and his grantee, unless the conveyance through which his grantee claimed was properly recorded, or the fact was otherwise brought to the knowledge of such third person.

The pleadings show that Bergen conveyed the land in dispute to Hamilton and Oyler in May, 1866; that he was then in the actual occupancy of it, had it enclosed, and was cultivating and farming it as his own. That the purchasers Hamilton and Oyler had at the time no knowledge that the appellant had any claim or interest in the land, and that there was no record of any conveyance from Bergen to the Madison and Indianapolis R. R. Co.

The conveyance of the land by Bergen and wife to Hamilton and Oyler was the strongest assertion on their part that the land belonged to them. It does not appear that the deed contained any covenants of title, but it does appear that the land occupied by Bergen was conveyed to Hamilton and Oyler. The conduct of Bergen, as stated in the pleadings, was, to say the least of it, equivalent to an assertion on his part that he was the owner of the land at the time he conveyed to Hamilton and Oyler. If a tenant in possession affirms himself to be the owner, he will, as to third parties having no actual or constructive knowledge of his tenancy, be regarded as the owner. Beatie *v.* Butler, 21 Mo. 313; Flagg *v.* Mann, 2 Sumn. 557; Barnhart *v.* Greenshields, 28 E. L. Eq. 77. Nor would the possession of the appellant of a strip fifteen feet in

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width, on the east side of the centre line of its track, be notice of title to any more of the land than the strip so occupied. Hridrews *v.* Lafferty, 1 Whart. 303.

We think the third paragraph of the counter-claim shows that Hamilton and Oyler were innocent purchasers of the land in controversy from Bergen, for a valuable consideration, without notice of the rights of the appellant, and that the court did not err in overruling the demurrer to it.

The appellant insists that the court erred in overruling its motion for a new trial by refusing to give to the jury the following instruction:

"If you find that Garrett C. Bergen executed the release mentioned in the cross-complaint, and that after its execution he remained in possession of all the one hundred foot strip mentioned therein until the purchase by Oyler and Hamilton, the law presumes that said Bergen held such possession as the tenant or by the license of the grantee in said release, and such possession of said Bergen would not be adverse to the title of the grantee in said release."

This instruction was, we think, pertinent. We think it is the law, and should have been given to the jury. Where the grantor remains in possession of the land granted, the law will not presume that his possession is against his deed. The reasonable and legal presumption is, that such possession is with the permission of the grantee, and subordinate to, and consistent with the grant.

It is insisted by the appellee that the release conveyed no title to the Madison and Indianapolis R. R. Co., and that, therefore, there was no error in refusing to give the instruction asked. This question has been before this court and decided, correctly, we think, adversely to the appellee. 60 Ind. 383.

It is also insisted that the appellant failed to prove that it had succeeded to the rights of the Madison and Indianapolis R. R. Co. This may be, but the right of the appellee to maintain the action depended upon his title to the land described in his complaint, and it was competent for the appellant to prove any fact alleged in its answer which tended to show a want of title in the appellee. As we think the court erred in refusing to give the instructions asked by the appellant, and that, for that reason, a new trial must be granted, we need not examine the other grounds urged in support of the motion for a new trial. The appellee has assigned cross errors, as follows:

1. The court erred in overruling the demurrer to the cross-complaint or counter-claim.

2. The court erred in permitting, over the objections of the appellee, to be read to the jury, as evidence in the cause, the lease of the Jeffersonville, Madison and Indianapolis R. R. Co. to the Pittsburg and Cincinnati R. R. Co.

3. The court erred in permitting, over the objection of the

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appellee, to be read as evidence in the cause the release purporting to be from Garrett C. Bergen to the Madison and Indianapolis R. R. Co.

4. The court erred in permitting, over the objection of the appellee, to be read to the jury, as evidence in the cause, the deed of D. G. Rose, Marshall of the United States, to E. Day and others.

5. The court erred in permitting, over the objection of the appellee, to be read to the jury the articles of association of the Indianapolis and Madison R. R. Co., and the record of the organization of said company.

6. The court erred in permitting, over the objection of the appellee, the articles of consolidation of the Jeffersonville R. R. Co. with the Indianapolis and Madison R. R. to be read to the jury.

The question raised by the first cross-error was passed upon by this court. 60 Ind. 383. We approve the decision there made.

We agree with the opinion expressed by the appellee in his brief, that if there was any error in admitting the evidence refused in the second cross-error assigned, it was harmless.

There is nothing in the third cross-error. The nephew of Garrett C. Bergen testified that he had seen Garrett C. Bergen write and that he could recognize his handwriting; that his signature to the release was, in the opinion of the witness, genuine. One witness testified that he had been in possession of the instrument for many years, and that it was the same as when he first saw it. The release was more than thirty years old. There was no error in its admission.

Nor was there any error in admitting the marshall's deed to Day and others, and the articles of association, and the record of the organization of the Indianapolis and Madison R. R. Co. The evidence might have constituted links in the chain of evidence necessary to establish the appellant's rights.

The objection to the articles of consolidation read in evidence by the appellant between the Jeffersonville R. R. Co. and the Indianapolis and Madison R. R. Co., is that no such companies are alleged in the counter-claim to have consolidated.

But if in the counter-claim the consolidating companies were misnamed, the court below would, upon motion, have allowed upon the trial an amendment of the counter-claim by inserting in it the true name of the consolidating companies. The counter-claim, as to the variance between the proof and the allegation, may be regarded as amended in this court. Kreswson et al. *v.* Cloud, 45 Ind. 273; Hamilton *v.* Winterowe, 43 Ind. 393. We think the judgment should be reversed at the cost of the appellee.

Per Curiam.—It is ordered upon the foregoing opinion that the judgment below be reversed at the cost of the appellee.

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COUNTIES OF CASS, CROW WING, WADENA, AITKIN, AND ITASCA,

v.

CERTAIN LANDS, etc.

(*Advance Case, Minnesota. September* 13, 1881.)

The Northern Pacific R. R. Co. was incorporated and endowed with a grant of lands by an act of Congress, approved July 2, 1864. *Held*, that upon full compliance with the terms of the grant, so far as certain lands in this State are concerned, the company became entitled to a complete, perfect, and absolute title to the same, and to receive the proper evidence of such title from the United States; that thereupon the lands ceased to belong to the United States, and became subject to the tax laws of this State, and that the company having contracted to sell the same, they were properly taxable under such laws. *Held*, further, that the provision of the act of Congress, passed in 1870, requiring the company, as a condition precedent to its right to patents for such lands, to pay the cost of surveying, selecting, and conveying the same, was an attempt to attach a new condition, not found in the original grant, to the company's right to the lands, and to the evidence of the title to the same which Congress had no power to impose, as its effect would be to deprive the company of property rights.

APPEAL from tax judgment of district court, counties of Cass, Crow Wing, Wadena, and Aitkin.

C. D. Kerr, for counties.

H. G. O. Morrison and Thos. Fitch, for appellant Morrison.

BERRY, J.—This is a controversy as to the taxability of certain lands embraced within the limits of the grant made by the United States to the Northern Pacific R. R. Co. by an act of Congress approved July 2, 1864. The stipulated facts upon which the case was determined by the district court are as follows, so far as here important: At and long prior to the time of the assessment and levy of the taxes in question, the railroad of said company was constructed and in operation across this State, and especially through the counties in which the lands to which this controversy relates are situated, and it has so continued to be operated to this time. The company has contracted to sell the lands to Morrison, who has paid for the same in full, and now contests the validity of the taxes. The government of the United States claims that, before issuing patents to the company for lands, it is entitled to receive the cost of surveying, selecting, and conveying the same, from the company, and no patents for such lands have been issued, for the reason that the company has not paid such cost into the federal treasury.

It is argued that, unless the failure to pay the costs mentioned prevents, the company is entitled to patents for the lands involved in the proceeding, and that they are subject to the taxes which

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have been levied upon them. The main question in the case is, do these lands belong to the United States? If they do, then they are exempted from taxation by that condition of the act of Congress, authorizing the people of the territory of Minnesota to form a State constitution, and come into the Union, which requires that no tax shall be imposed on lands belonging to the United States. If, on the other hand, they do not belong to the United States, but the company, having become entitled to a complete, perfect, and absolute title to them, and entitled to receive the proper evidence of such title from the United States, has contracted to sell them to Morrison, then under the laws of this State they are subject to taxation. As the land grant of the company within this State includes, if full (as we understand it to be), between two and three millions of acres, hundreds of thousands of which have already been sold, or contracted to be sold, by the company, as all will be in the future, the question presented is one of vast practical importance to the people of this State, and especially to the inhabitants of the counties, towns, and other territorial subdivisions in which the lands lie.

The Northern Pacific R. R. Co. was incorporated and endowed with a grant of lands by an act of Congress approved July 2, 1864. 13 U. S. St. at Large, 365, § 3, so far as necessary to be quoted, is as follows: "And be it further enacted, that there be and hereby is granted to the Northern Pacific R. R. Co., its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, . . . alternate sections of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line as said company may adopt, through the territory of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any State," etc. Section 4 provides "that whenever said Northern Pacific R. R. Co. shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said lands situate opposite to and coterminous with said completed sections of said road; and from time to time, whenever 25 additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to such company conveying the additional sections of land as aforesaid, and

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so on as fast as every 25 miles of said road is completed as aforesaid: provided, that not more than 10 sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order," etc. Section 20 is as follows: "And be it further enacted, that the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes—Congress may at any time, having due regard for the rights of said Northern Pacific R. R. Co., add to, alter, amend, or repeal this act."

By an act of Congress approved July 15, 1870 (16 U. S. St. at Large, 305), among other things appropriating money for the survey of the public lands within the limits of the land grant of the Northern Pacific R. R. Co., it is provided "that before any land granted to said company by the United States shall be conveyed to any party entitled thereto, under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest." From the concessions of the parties it appears that, except as respects the payment of the cost mentioned, everything has been done required by the terms of the grant to entitle the company to a complete, perfect, and absolute title in fee to the lands in controversy, and to entitle it to receive the proper evidence of such title from the United States. In other words, the company has earned and paid for the lands by complying with the conditions of the grant, and if a formal conveyance be necessary to vest it with the legal title, it is, nevertheless, in the fullest sense, the equitable owner of the land, and the legal title is held by the United States as a naked trustee, solely and simply for the company's use and benefit. This is so irrespective of any notion of a grant in præsenti and its effect in conferring title in præsenti.

If, then, we leave out of view the provision before quoted as to the payment of the cost of surveying, etc., the case is one in which, under repeated decisions of the federal supreme court, the right and title of the company to the lands became such that they ceased to belong to the United States, and are therefore subject to taxation in accordance with the laws of this State. Carrol *v.* Safford, 3 How. (U. S.) 441; Ry. Co. *v.* Prescott; Railway *v.* McShane, infra. Is this result affected by the provisions as to payment of cost of surveying, etc., in the act of July 15, 1870? We think not. These provisions seek to impose a new condition upon the grant of lands

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made by the act of 1864. They require the company to do something more than that act required it to do to earn the lands, viz., to pay the cost of surveying, etc. To that extent the contract of the United States with the company is attempted to be impaired, and although the federal constitution contains no limitation (in so many words) upon the power of Congress to pass laws impairing the obligation of contracts, the fifth amendment contains a clause declaring that no person shall be deprived of property without due process of law. This covers the case of a contract right, whether the contract be executed or executory; for a contract right of either kind is property. Rice *v.* Ry. Co., 1 Black, 358; Clark *v.* Mitchell, 64 Mo. 564; Twitchell *v.* Com., 7 Wall. 321.

We are therefore of opinion that it was not competent for Congress to pass the provision requiring the company to pay the cost of surveying, etc., as a condition precedent to its right to patents for the lands granted to it by the act of 1864, and that that provision is therefore not binding upon the company, and does not affect its absolute, complete, and perfect right to such lands and to the proper evidence of such right, upon compliance with the terms in that act specified. The power of amendment reserved in the twentieth section of the charter obviously fails to embrace any authority to attach any such new condition to the grant. This case is distinguishable from Ry. Co. *v.* Prescott, 16 Wall. 603, and Ry. Co. *v.* McShane, 22 Wall. 44. In both of these cases the enactment requiring payment of the expenses of surveying, locating, and selecting the lands granted to the company, as condition precedent to the issue of patents, was one section of an act so amending the original charter of the Union Pacific R. R. Co. as largely to increase its original grant of lands. This act was one whole, and in accepting and availing itself of the increase of its land grant the company accepted the whole act, thereby assenting to the imposition of this new condition attched to its right to its original land grant. The condition was a part of the act by which the land grant was increased, and the increase was therefore controlled by it as a matter of course.

The district court decided that the lands in controversy were properly taxable, and properly taxed. Upon the grounds above indicated, we are of opinion that the decision was correct, and it is accordingly affirmed.

See note, p. 451.

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THE ST. JOSEPH AND DENVER CITY R. R. Co., WILLIAM BOND, Receiver,

v.

MATTHEW BALDWIN.

(*United States Supreme Court, October Term*, 1881.)

The act of Congress of July 21, 1866, granting certain lands to the State of Kansas to aid in the construction of the Northern Kansas R. R., construed to be a grant in præsenti, and to vest the right of way in the railroad from the date of the passage of the act, and not merely from the date of the location of the road, and that subsequent settlers on the land granted took subject to this right of way.

Semble that where Congress has conferred on a railroad of a State a right of way over the public lands in a Territory, the State subsequently created out of that Territory cannot prevent the enjoyment of the right previously conferred on the corporation.

ERROR to the Supreme Court of the State of Nebraska.

This was an action by the plaintiff, under the laws of Nebraska, to recover of the St. Joseph and Denver City R. R. Co., or its successor in interest, damages for entering upon his land in that State and appropriating, in the construction of its road, a strip of the land two hundred feet in width and two hundred rods in length. The company claimed a right of way over the land, of that width, under the act of Congress of July 23, 1866, entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas R. R. and Telegraph Co." 14 Stat. 210. The first section of the act, so far as it is material in this case, is as follows:

"Be it enacted, etc., That there is hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City R. R. Co., the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly, via Maryvill, in the same State, so as to effect a junction with the Union Pacific R. R., or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of route of said road is definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the

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duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of preemption or homestead settlements have attached as aforesaid, which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid."

The fourth section is as follows:

"And be it further enacted, That as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

The sixth section is as follows:

"And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said St. Joseph and Denver City R. R. Co., its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turntables, and water stations."

When the grant of Congress was made, the land claimed by the plaintiff was vacant and unoccupied land of the United States; but the line of the road over it was not definitely located until October, 1871. He acquired whatever rights he possesses in October, 1869. The defendant contends that the plaintiff took the land subject to its right of way. He contends that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the Secretary of the Interior. The District Court of the State agreed with him and gave judgment in his favor. The Supreme Court affirmed it, and to review it the cause is brought here.

Doniphan & Reed and John F. Dillon, for plaintiff in error.

E. E. Brown, for defendant in error.

FIELD, J.—The act of Congress of July 23, 1866, makes two distinct grants: one of lands to the State of Kansas for the benefit of the St. Joseph and Denver City R. R. Co., in the construction of a railroad from Elwood, in that State, to its junction with the

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Union Pacific, via Maryville; the other of a right of way directly to the company itself. The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. Their grant was subject to the condition that if at the time the line of the road was definitely fixed the United States had sold any section or a part thereof, or the right of preëmption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated, which should be held by the State for the same purposes. The limitations upon the grant are similar to those found in numerous other grants of land made by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the mean time any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress therefore adopted the policy of keeping the public lands open to occupation and preëmption and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other lands in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired. The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant in præsenti. The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. "There is hereby granted" are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this court to similar language in other acts of Congress. (Missouri, Kansas and Texas R. R. Co. *v.* Kansas Pacific, 97 U. S. 497, 498; Leavenworth, Lawrence and Galveston R. R. Co. *v.* United States, 92 U. S. 733.)

But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the

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terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.

The fact that the right of way over land in Nebraska was granted to a corporation in Kansas does not alter the case. Nebraska was at the time a Territory of the United States, and it was entirely competent for Congress to confer upon any corporation of a State a right of way for a railroad to be constructed by it through the lands of the United States situated in that Territory; and in February, 1869, after the Territory had become a State, its Legislature, by an express enactment, authorized railroad companies organized under the laws of Kansas, Missouri, or Iowa to extend and build their roads into the State, and declared that upon complying with certain conditions they should possess all the powers, franchises, and privileges of railroad companies incorporated under its laws. It is not shown that the company here has not complied with the prescribed conditions, even if such an objection could be raised by any other party than the State itself. But, independently of this consideration, where Congress has conferred upon a railroad corporation of a State a right of way over the public lands of the United States in any one of their Territories, it may be doubted whether the State subsequently created out of the Territory could prevent the enjoyment by such corporation of the right conferred. It could do so only on the same terms that it could refuse a recog-

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nition of its own previously granted right, for in such matters the State would succeed only to the authority of Congress over the Territory.

The judgment of the Supreme Court of Nebraska must therefore be reversed, and the cause be remanded to it with directions that further proceedings be had in accordance with this opinion: and it is so ordered.

Reversed.

See note, p. 451.

The Atchison, Topeka, and Santa Fé R. R. Co.

v.

Aaron Bobb.

(24 *Kansas Reports*, 673. *January Term*, 1881.)

The plaintiff was a beneficiary of the grant made by the act of Congress of March 3d, 1863, granting lands to the State of Kansas to aid in the construction of certain railroads. The line of its road was definitely located and fixed in and through the county of Rice on December 10th, 1870; but no order was made by the Secretary of the Interior withdrawing lands along such ine from sale and the operation of the homestead and preëmption laws, until February 13th, 1871. *Held*, that the title passed on December 10th, 1870, and that a settlement by defendant on a tract of land within the limits of the grant, made between December 10th, 1870, and February 13th, 1871, gave to the latter no right to homestead or preëmpt the land.

Error from Rice District Court.

Ejectment, brought by the A., T. and S. F. R. R. Co. against Bobb, to recover a certain quarter section of land situated in Rice county. Trial at the February Term, 1880, of the district court, and judgment for the defendant. The opinion states the facts.

Ross Burns, for plaintiff in error.

J. H. Smith, W. R. Brown, and H. J. Abbott, for defendant in error.

Brewer, J.—This case was tried in the court below, on the following agreed statement of facts, dated June 3, 1879, and signed by the attorneys for the parties hereto.

"It is agreed by and between the plaintiff and defendant in the above-entitled cause, that the same may be tried at the June term, 1879, by the court, without a jury, and in all other courts wherever or whenever the same may be heard or tried, by appeal, review, or otherwise, upon the following agreed statement of facts, and none other:

"I. The plaintiff is, and was at all the times hereinafter alleged,

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a railroad corporation, duly created and organized under the laws of the State of Kansas.

"II. That, as such railroad corporation, it was a beneficiary under the certain act of the Congress of the United States, entitled 'An act for a grant of lands in the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March 3, 1863, and the act of the Legislature of the State of Kansas, entitled 'An act to accept a grant of lands made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such roads and telegraphs,' approved February 9, 1864, and which acts, and each of them, as they are and appear in the statute book, are hereby referred to and made a part of this agreed statement of facts.

"III. That the plaintiff duly accepted the provisions of said acts, and did proceed with the construction and completion of its road in accordance therewith.

"IV. That the land in dispute is the south-east quarter of section seven (7), in township twenty (20), south, of range eight (8), west, in the county of Rice, in the State of Kansas.

"V. That the definite location of the line of plaintiff's railroad in and through the county of Rice, and at and opposite to said land, was made, and the proper surveys, maps and profiles made and filed, and such definite location of the plaintiff's line of railroad aforesaid approved by the proper officers, as contemplated by the before-mentioned acts, on the 10th day of December, 1870.

"VI. That on the 23d day of January, 1871, the defendant, with his family, made actual settlement on said land, in good faith, intending to take the same under the preëmption laws of the United States.

"VII. That on the 30th day of January, 1871, the defendant duly filed his declaratory statement to obtain said land as a preëmption, and has at all times since then fully complied with all the preëmption laws of the United States concerning said land.

"VIII. That on the 13th day of February, 1871, this land, along with other lands, was withdrawn by the Secretary of the Interior, and in pursuance of the aforementioned acts, from sale, and from the operation of the homestead and preëmption laws of the United States.

"IX. That in a contest had by and between the plaintiff and defendant before the interior department, it was finally decided by the Secretary of the Interior that the defendant's filing on said land as a preëmption claim as aforesaid should be cancelled, and that the said land inured to the plaintiff under and by virtue of its said land grant, and that in pursuance of said decision, on the 29th day of June, 1872, the filing of the defendant was cancelled, and the land conveyed by patent to the plaintiff, and that ever since that time

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the plaintiff has been the holder of the legal title thereto (and by the phrase 'legal title' is meant the title conveyed by the patent, the defendant in no wise admitting that the plaintiff was or is rightfully the holder of the legal title, or the rightful owner of the land).

"X. That on the 23d day of December, 1872, the line of the plaintiff's railroad was fully constructed and completed, as required by the aforesaid act of Congress and the act of the Legislature of the State of Kansas.

"XI. That on the 17th day of November, 1876, the defendant made proper application to the proper officers to make final proof, under the preëmption laws, to obtain this land under said laws, under the provisions of the act of the Congress of the United States, entitled 'An act to confirm preëmption and homestead entries of public lands within the limits of railroad grants where such entries have been made under the regulations of the land department,' approved April 21, 1876; which act, as the same appears and reads in the statute book, is hereby referred to and made a part of this agreed statement of facts.

"XII. That on the 28th day of November, 1876, the proper officer of the interior department authorized and allowed the defendant to make final proof under his application above mentioned.

"XIII. That on the 28th day of November, 1876, the defendant did duly make final proof under the preëmption laws in order to obtain this land, before the proper officer, and has at all times, and in everything, and at the proper time, complied with the requirements of the preëmption laws of the United States.

"XIV. That under the authority, decision and direction of the commissioner of the general land office, the defendant was permitted to enter, under the provisions of the last-mentioned act of Congress, approved April 21, 1876, the land herein described; and that the defendant made final proof and payment for the land, and obtained the final receipt of the receiver of the land office therefor.

"XV. That an appeal was taken by the plaintiff from the order and decision of the said commissioner, permitting the defendant to enter the land as a preëmption, and that the same was finally decided by the interior department and the secretary thereof, on the 9th day of March, 1878, in favor of the defendant, on the ground that 'the first section of said act, approved April 21, 1876, provides that all preëmption entries made on the public lands in good faith, by actual settlers, upon tracts of not more than one hundred and sixty acres within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office in which such lands are situated, and where the preëmption laws have been complied with and proper proofs have been made by the parties holding such tracts, shall be confirmed, and patents for the same shall issue to the parties

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entitled thereto. As the filing of Bobb was prior to the time when notice of the withdrawal of this tract was received at the local office, and he has complied with the requirements of law, I am of opinion that (notwithstanding my predecessor held Bobb's filing for cancellation June 29, 1872, and awarded the tract to the railroad company, for the reason that it inured to it under its grant prior to Bobb's settlement, and it has been patented to the railroad company) the case of Bobb is within the provisions of the said act, as I decided on the 7th of February last, in the case of Streeter, under a similar state of facts. I therefore affirm your decision,' as appears in the letter of the secretary of the interior department to the commissioner of the general land office.

"XVI. That in case the court on the foregoing facts shall find the law to be for the plaintiff, the judgment of the court shall generally be for the plaintiff, and for the possession of the land, and for costs of suit; and if for the defendant, the judgment shall be against the plaintiff, and in favor of defendant for costs."

Judgment was rendered in favor of the defendant, and the plaintiff brings the case to this court for review.

The single question is, whether the title of the plaintiff vested at the time of the definite location of its road, or not until the lands were formally withdrawn from sale by the order of the Secretary of the Interior. If the former, this land became and was the property of the plaintiff before defendant moved upon it. This is no open question. Under the act of Congress of March 3, 1863 (12 U. S. Stat. p. 772), a present grant of lands was made to the State of Kansas, of which the railroad became the beneficiary; in and by which act every alternate section of land, designated by odd numbers, for ten sections in width on each side of the road intended to be benefited, were then granted to the State for such road. But, in case it should "appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same," then other lands may be selected. In this case the road had been definitely located, and nothing then stood in the way to prevent its right from attaching to this land. Some time after, the defendant in error made a settlement on the land, and filed his declaratory statement for the purpose of taking it under the preëmption laws.

The supreme court of the United States has decided, when passing upon similar grants, that, just so soon as the route of the road became definitely fixed, at that time the grant became a certainty, and the alternate sections of odd-numbered lands within ten miles of the line as definitely fixed, at once attached to the grant and vested in the company. As long ago as 1817, the supreme court, in construing a grant of lands made to General Nathaniel Greene,

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was unanimously of the opinion that the act vested a title in General Greene, and that the survey afterward made gave precision to that title and attached it to the lands surveyed. (Rutherford *v.* Greene's Heirs, 2 Wheat. 196.) In the case of R. R. Co. *v.* Fremont County, 9 Wall. 94, the court says: "Until the line of the railroad was definitely fixed upon the ground, there could be no certainty as to the particular sections of land falling within the grant; nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed." Again, in the case of R. R. Co. *v.* Smith, 9 Wall. 97: "The grants of lands by Congress to the States, in aid of railroads, have generally been made with reference to the lands through which the roads were to pass, and as the line of the road had to be located after the grant was made, it has been usual in the acts making the grants to describe them as alternate sections of odd numbers, within a certain limit on each side of the road when it should be located. This, of course, left it to be determined by the location of the road what precise lands were granted. So far as this uncertainty in the grant was concerned, it was one which might remain for a considerable time, but which was capable of being made certain, and was made certain by the location of the road." And again, in the case of Schulenberg *v.* Harriman, 21 Wall. 60: "It is true that the route of the railroad for the construction of which the grant was made was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections to be afterward located; when the route was fixed their location became certain; and the title, which was previously imperfect, acquired precision, and became attached to the land." And in the case of L. L. & G. R. R. Co. *v.* United States, 2 Otto, 741, the court, construing this very act under which plaintiff claims, says: "It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted,' are words of absolute donation, and import a grant in præsenti. This court has held that they could have no other meaning; and the land department on this interpretation of them has uniformly administered every previous similar grant. They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed."

It seems idle to add anything to these citations from the decisions of the United States supreme court, which cover the very point, and are upon a question whose final determination rests with that court. Neither does it seem necessary to add that a different con-

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struction of the law in the land office, or by the Secretary of the Interior, in no manner affects the plaintiff's title, nor can that title be disturbed by a subsequent act of Congress.

The judgment of the district court will be reversed, and the case remanded with instructions to render judgment upon the agreed statement, in favor of the plaintiff in error, for possession of the land and costs of the suit.

All the justices concurring.

See note, p. 451.

THE KANSAS PACIFIC RY. CO.

v.

LEWIS DUNMEYER.

(24 *Kansas Reports*, 725. *January Term*, 1881.)

The mere acceptance of a deed by one in occupation of land does not estop the grantee from questioning the title conveyed by that deed, or from suing on the covenants for failure of title, and this, notwithstanding such grantee had, at the time of receiving the deed, himself a preëmption right to the land. Such acceptance is not of itself proof of the settlement and compromise of a controversy.

July 25, 1866, M. made a homestead entry of a tract of land. On July 11, 1866, the railroad company, one of the companies named in the act of Congress of July 2, 1862, filed its map, showing the general line of its road. On July 14, the commissioner of the general land office wrote to the local land officers, advising them of the filing of this map, and directing the withdrawal of the lands along the line of the road, in accordance with the provisions of the act of Congress of July 3, 1866. This letter was received July 26, 1866, and the same day the entries were made of the withdrawal. The land upon which M. had filed was in an odd-numbered section within the limits of this withdrawal. Afterward, the road was built, and on December 17, 1869, M. purchased from the railroad company, and took a certificate of purchase, which after one or two assignments passed into the hands of the plaintiff, and was by him surrendered to the company, and a deed taken. April 28, 1871, M.'s homestead entry was cancelled; but in October, 1871, D. made a new homestead entry. A contest was had before the land officers between D. and the railroad company, which was decided by the commissioner of the land office in favor of D. The company not appealing, the decision was made final, and a patent issued to D. *Held*, that the title conveyed by the patent to D. was paramount to any title passed to the company by its land grant.

ERROR from Saline District Court.

Action brought by Dunmeyer against the Kansas Pacific Ry. Co., to recover damages because of his ouster from a certain tract of land, to which the defendant had, in consideration of $200, executed to him a warranty deed. Trial by the court at the November Term, 1879, when the court found for the plaintiff, and as-

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sessed his damages at $326.45, and costs. New trial denied, and judgment accordingly for the plaintiff. The defendant brings the case to this court. Other facts appear in the opinion.

J. P. Usher and Charles Monroe, for plaintiff in error.

John Foster, for defendant in error.

BREWER, J.—This case has once been in this court, and is reported in 19 Kas. 539. A judgment against the railroad company was then reversed, and the case remanded for a new trial. Subsequently, the petition was amended to conform to the views expressed in the opinion then filed, and a second trial was had, resulting again in a judgment against the railroad company. This second judgment is now challenged by the plaintiff in error.

Two principal questions are presented, which are all we deem it necessary to notice. It may be premised that the main facts appear now as they did when the case was here before.

The first proposition of counsel is, that the plaintiff is estopped from asserting that the title acquired from the Government by G. B. Dunmeyer, and purchased by him, is paramount to that acquired by him from the defendant. This proposition is rested upon the doctrine of the effect of a compromise of disputed rights, as laid down by this court in the case of the A., T. & S. F. R. R. Co. *v.* Starkweather, 21 Kas. 322. But compromise implies controversy. None appears here. The mere purchase of a title and acceptance of a deed are not necessarily a compromise, the settlement of a controversy, even though the party receiving the deed has at the time himself a different claim. In the Starkweather case, it appeared that the parties had a controversy; that this controversy was litigated in the land department of the United States, and decided adversely to Starkweather; that then, being out of funds and unable to carry on the litigation in another forum, and to prevent a sale by the railroad company, he went to the company and purchased. By that he settled and compromised a pending controversy, and we held that he was bound by that settlement. In the opinion we referred to some cases in which the mere acceptance of a deed was held to estop from questioning the title apparently conveyed thereby, but expressed our dissent from the extreme views of those cases. Those cases are cited by counsel, and the contention is that the case at bar is stronger than any of them, and more within the scope of the reasoning in the Starkweather case. We cannot concur with counsel. The record before us fails to show any controversy between Miller, the original purchaser from the company, and the company. It simply shows that, having an occupation of the land which might be the foundation of a title by preëmption or homestead, he suffered that to go by default and purchased from the company. He never contested with it the question of superior title. In fact he had no title. He had a prior

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right to purchase or acquire title by occupation from the Government; but that is all. Instead of purchasing from the Government, he bought from the company. And this, not by way of closing any litigation or settling any controversy, but doubtless because he then thought that the company had title to convey. The company never attempted to disturb his possession; never, save in the mere act of receiving money and issuing a deed, asserted any claim to the land. In other words, before any controversy arose he purchased. Now unless the mere acceptance of a deed and payment for the title conveyed thereby is proof is of a controversy and the settlement of it, this case shows no controversy or compromise.

Further, Miller, the original purchaser from the company, is not now a party in interest. He assigned his certificate of purchase, and after one or two assignments it passed into the hands of plaintiff, who surrendered the certificate and took a deed. In other words, plaintiff, not an original occupant of the land, and without, so far as appears, actual knowledge that there was ever any preëmption or homestead right thereto, finds a party holding a contract of purchase from the defendant, and buys that evidence of title. That title, thus contracted for, and afterward conveyed by defendant, fails, and a paramount title is yielded to and purchased. It is not Miller's paramount title that was yielded to, but the Government's. Miller never had title, and by abandoning the land he lost the right to acquire title. He had nothing to convey, and he gave no warranty. The defendant warranted, but had no title. It warranted to plaintiff, and not to Miller. Miller's conduct neither bettered nor injured defendant's claim of title. Being on the tract with the intention of homesteading it at the time defendant's grant attached, this tract never passed to the company. Whether Miller abandoned it or continued his occupation, was immaterial. Defendant's title to lands within the strip is of a fixed date. At that date the alternate sections "not sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached," were identified. The title dates from the date of the grant, but the identification is of the time the line is definitely fixed. Then the float attached to the particular lands and the grant became as definite as though the various sections had been particularly named. The float ceased. The grant was exhausted. The lands were designated. The company took and could take nothing more, no matter what change in title or condition of other lands might thereafter arise. The excepted lands did not and were not in any contingency to become its property. "The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed." (M., K. & T. Ry.

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Co. *v.* K. P. Ry. Co., 97 U. S. 491.) "And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and conditionally excepted from the grant; and it makes no difference whether or not they subsequently became a part of the public lands of the country." (L. L. & G. R. R. Co. *v.* U. S., 92 U. S. 733.) So that whether Miller maintained or abandoned his homestead entry and occupation after the time that the line of defendant's road was definitely fixed, in no manner affected its rights to the land.

The other contention of counsel is, that in fact the company did have the title. The facts are, that on July 25, 1866, Miller made a homestead entry of the land. On the 3d of July, 1866, an act of Congress was passed, providing for the filing of a map of the general line of its road by the company defendant, and that "upon the filing of said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale, by order of the Secretary of the Interior." This act was but an extension of the right conferred by the original act of 1862, in which it was provided, that upon the filing of the map of the general route, "the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry and sale." (12 U. S. Stat., p. 493, § 7.) On July 11th, the company filed its map. On July 14th, the commissioner of the general land office wrote to the local land officers to withdraw the lands from sale, homestead and preëmption entry, which communication was received by them on July 26th, and on that day the proper entries were made upon their maps and plats to indicate such withdrawal. The line of defendant's road along and adjacent to this land was not definitely fixed until September 21, 1866. On December 17, 1869, Miller purchased from the company, and took a certificate of purchase. On April 28, 1871, Miller's homestead entry was cancelled. On October 16, 1871, G. B. Dunmeyer made a homestead entry. A contest arose before the land office between him and the company, which was decided by the commissioners in favor of Dunmeyer, and no appeal being taken to the Secretary of the Interior, the decision was made final, and a patent issued to him. Now it is claimed, that by the filing of the map, the lands were withdrawn from market, and that no homestead or preëmption right could thereafter attach. Hence, Miller's homestead entry was void, and the title passed by the grant to the company. We are inclined to think this view not correct. The lands are to be reserved from sale, by order of the Secretary of the Interior, or, in the language of the prior act, he is to cause them to be withdrawn from sale, etc. This, it would seem, contemplates some act by the department, and until that act was completed the withdrawal was not made. No formal order of the Secretary is shown.

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The only thing is the letter from the commissioner to the local land officers, and their action thereon. The land was then in fact withdrawn. Perhaps the order of the Secretary, if one was made, was to take effect upon the receipt by the local land officers of the notice and letter from the commissioner. If so, it would seem to be within the scope of his powers. And in the absence of other showing, this action of the subordinates of the Secretary of the Interior must be taken as in fact the order of the Secretary. The language concerning withdrawals differs from that respecting the grant. The latter is, "that there be and is hereby granted," etc. It is absolute, depending on the action of no officer, and takes effect upon the passage of the act (97 U. S. 491). The other casts a duty upon an officer of the government. It does not provide that the lands shall be withdrawn upon the filing of the map, and by virtue of that act alone, but that the Secretary shall cause them to be withdrawn when that map is filed. In other words, a duty is cast upon him, and on the performance of that duty the withdrawal is complete. That duty, so far as the record here shows, was completed on July 26th, and that is therefore to be taken as the date of the withdrawal. In the case of the K. P. Ry. Co. *v.* M., K. & T. Ry. Co., in this and the supreme court of the United States, it seems to have been an unquestioned fact that July 26th was the date of the withdrawal. (15 Kas. 20; 97 U. S. 491.) True, that date was not one of moment perhaps in that case, and the expression in the opinion of the two courts concludes no one. Still, it serves to show the general understanding of the scope and effect of the statute concerning withdrawals. The rulings of the land department of the United States have not been uniform, it is believed, upon this question, and Congress attempted, by Act of April 21, 1876 (U. S. Stat. 1876, p. 35), to put an end to dispute. That act is in harmony with the conclusions reached by us.

It should also be noticed that the company litigated with Dunmeyer his right to homestead before the land office, and it was defeated in that litigation. That decision, if based upon the construction of a statute or a question of law, may not be conclusive, but so far as it determines a fact, it is, except in case of fraud, etc. (Johnson *v.* Towsley, 13 Wall. 72.) The record before us does not clearly and fully disclose the ground of the decision. The simple conclusion of the contest is about all that appears. The company's grant is spoken of as taking effect March 3, 1869. Upon what facts that conclusion is based, nothing in the record before us shows. It may, however, be conceded that probably the decision was based upon a construction of the statute upon undisputed facts. We do not rest our judgment upon that decision, but refer to it as an opinion in harmony with our own. While the question, it must be conceded, is doubtful, we think the ruling of the district court was correct, and that the title

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conveyed by the patent to Dunmeyer was in fact paramount to that of the company.

We notice no other questions of importance which were not in the case when here before and then considered.

The judgment will be affirmed.

All the justices concurring.

See note, p. 451.

JOHN EMSLIE et al.,

v.

MARTHA E. YOUNG.

(24 *Kansas Reports*, 732. *January Term*, 1881.)

A homestead entry made before the definite location of the railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not cancelled until after the location, did not operate to except the land from the grant to the railroad company under the provisions of the act of Congress of March 3, 1863, donating to the State of Kansas lands to aid in the construction of certain railroads and telegraphs.

The land in controversy—a part of an odd-numbered section, and within the ten-mile grant of land to the A., T. and S. F. R. R. Co., by virtue of the act of Congress of March 3, 1863—was in 1863 public land open to homestead settlement; in October, 1863, one R. homesteaded it; in 1868 he voluntarily abandoned it; in June, 1869, the line of the railroad of the A., T. and S. F. R. R. Co. was definitely located opposite to this land. At the time of such definite location the land was abandoned, but the entry or filing of R.'s homestead was uncancelled; on November 3, 1869, a withdrawal of lands was made under the act of March 3d, 1863, within the limits of which withdrawal the land is situate; in May, 1874, the land was certified to the State of Kansas, and in February, 1875, patented by the State of Kansas to the railroad company; in October, 1871, one S. had R.'s entry cancelled, and then homesteaded the land himself. S.'s entry was, on the application of the railroad company, afterward cancelled, but on August 14, 1878, reinstated by the Secretary of the Interior, under the provisions of the act of Congress of April 21, 1876, and on April 2, 1879, a patent was issued to S. *Held*, That the title to the land vested in the railroad company in June, 1869; that the entry of S. was erroneously reinstated; that the title of the railroad company to the land could not be disturbed by an act of Congress subsequent to June, 1869; and that the decision of the land department awarding the land to S. in 1878, by a mistake of law, is not conclusive.

ERROR from Chase District Court.

Action to quiet title, brought by Young, who filed her petition, and the defendants failing to appear judgment was rendered on the first day of the term in her favor, on the averments of the petition, without any testimony having been introduced to support the same.

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The petition (court and title omitted) is as follows:

"The plaintiff states that, on the 21st day of October, 1863, one John W. Randall duly entered upon the following described real estate in Chase County, Kansas, to wit, the south-west quarter of section thirty-three, in township nineteen, range eight, east, for the purpose of making the same his homestead, and on said day duly filed on the same as such homestead, in the United States local land office at Junction City, in the County of Davis, in the State of Kansas, and continued to occupy and improve the same as such homestead, until some time in the year 1868, at which time he abandoned the same as a homestead, and on the 12th day of October, 1871, upon the information and at the instance of Andrew J. Stainbrook, the said entry of the said Randall was duly cancelled by the judgment and order of the United States land office at Washington, D. C., and on the 21st day of November, 1871, the said Andrew J. Stainbrook duly entered upon the said real estate as his homestead, duly filed in the United States local land office at Salina, Saline County, State of Kansas, and continued to occupy, live upon and improve the same as such homestead, until sometime in the month of August, 1876; that, prior to the making of said entry the said Andrew J. Stainbrook had served in the army of the United States, as a volunteer soldier in the late war of the great rebellion, for the term of three years; that on the 30th day of June, 1869, the Atchison, Topeka and Santa Fé R. R. was definitely located by the Atchison, Topeka and Santa Fé R. R. Co. through Chase County, Kansas, and by said location the said real estate became within the ten-mile grant of real estate to said company by virtue of an act of Congress, entitled 'An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March 3, 1863, and, in conformity to said act, the notice of withdrawal of the lands within said grant from sale, or homestead or preëmption entries, was received at the said local land office on the 3d day of November, 1869, and on the 24th day of September, 1873, the United States land office at Washington, D. C., at the instance of the said railroad company, cancelled the entry of the said Stainbrook, upon the ground that the same was in conflict with the rights of said railroad company, acquired by the said act of Congress, and the location of the said line of the railroad, and the said notice of withdrawal, and upon no other ground whatever.

"And this plaintiff further alleges, that the cancellation of said Stainbrook's homestead entry by the United States land office was done upon the ex parte application of the said railway company, without any notice whatever to Stainbrook, and without any knowledge on his part of the proceedings. And on the 28th day of May, 1874, the said land was, among others, erroneously certified to the

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State of Kansas for the benefit of the Atchison, Topeka and Santa Fé R. R. Co. under said act of Congress, and subject to all its conditions and to any valid interfering rights which may exist. And on the 8th day of February, 1875, the State of Kansas issued to the Atchison, Topeka and Santa Fé R. R. Co. a patent to said real estate and other lands in the county of Chase along the line of said railroad, in accordance with the act of Congress, and subject to all its conditions and to any valid interfering rights which may exist. And on the 22d day of April, 1879, the said patent was filed for record in the office of the register of deeds of Chase County, and was by him recorded in Book I of the records of deeds of said county, on page 568. And on May 20, 1874, the Atchison, Topeka and Santa Fé R. R. Co. executed, acknowledged and delivered to the defendant Goss a warranty deed for the said real estate, which deed was filed for record in the office of the register of deeds of Chase County, on the 22d day of March, 1876, and was by him recorded in Book G of the records of deeds of that county on page 625. And on the 3d day of February, 1877, the said Goss executed, acknowledged and delivered to the defendant John Emslie a warranty deed for said real estate, which deed was, on the 6th day of February, 1877, filed for record in the office of the register of deeds of Chase County, and was by him recorded in Book H of the records of deeds of said county, on page 366. And on the 6th day of February, 1877, the defendants John Emslie and Jane Emslie executed, acknowledged and delivered to the defendant Goss a mortgage on the said real estate to secure the payment of the sum of $1180, by the said John Emslie to the said Goss; that on the 7th day of February, 1877, the mortgage was filed for record in the office of said register of deeds and was by him recorded in Book B of mortgages of Chase County on page 339; that on the 15th day of August, 1878, the said Andrew J. Stainbrook commenced a proceeding by making application to the local land office at Salina, in Saline County, Kansas, the same being the local land office of the district in which the said real estate is situated, to have his entry reinstated, his application being made under and by virtue of an act of Congess entitled 'An act to confirm preëmptions and homestead entries within the limits of railroad grants, in cases were such entries have been made under the regulations of the land department,' which act was approved April 21, 1876; and on the 19th day of November, 1877, the said application was rejected by the commissioner of the general land office at Washington, D. C., and from said refusal Stainbrook duly appealed to the Secretary of the Interior; and on the 14th day of August, 1878, the Secretary of the Interior reversed the rejection and reinstated the homestead entry. And thereafter—to wit, on the 2d day of April, 1879—by virtue of the aforesaid proceedings by Andrew J. Stainbrook, he duly obtained a patent for the said real

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estate from the United States, a copy of which patent is attached to and made a part of this petition, and marked 'Exhibit A' for identity, and here referred to as a part hereof; that on the 2d day of May, 1879, the said Andrew J. Stainbrook and Lucy A. Stainbrook his wife duly executed, acknowledged and delivered to this plaintiff a warranty deed for the following portion of said real estate, to wit: the north half of south-west quarter of section thirty-three, township nineteen, range eight, east; and by virtue thereof this plaintiff is now the owner in fee simple, clear of incumbrances, and in possession of the following above-described real estate, to wit: the north half of the south-west quarter of section 33, township 19, range 8, east, in Chase County, Kansas; that the defendant Jane Emslie is the wife of the defendant John Emslie, and by reason of the patent from the State of Kansas to the railroad company, and the deed from the railroad company to the said Goss, and the deed from the defendant Goss to the defendant John Emslie, and the mortgage from the defendant John Emslie and Jane Emslie, his wife, to the defendant Goss, having all been executed and recorded as aforesaid, the deed from the defendant Goss to the defendant John Emslie and the record thereof, and the mortgage from the defendant John Emslie and Jane Emslie, his wife, to the defendant Goss and the record thereof, and each and all of them, are clouds upon this plaintiff's title to the real estate deeded to her by Andrew J. Stainbrook and Lucy A. Stainbrook, his wife, as aforesaid; and the said John Emslie claims that, by virtue of the deed from Goss to him as aforesaid, he is the owner of the said real estate; and Jane Emslie claims that the said John Emslie is the owner of said real estate, and by reason of her being his wife, that she has an inchoate interest therein; and the said Goss claims that, by virtue of the mortgage from John Emslie and Jane Emslie to him of the aforesaid real estate, that he has a lien thereon for the payment of the sum for which the mortgage was given as aforesaid.

"Wherefore, this plaintiff prays that the deed from the said Goss to John Emslie of the aforesaid real estate, and the mortgage from the said John Emslie and Jane Emslie to the said real estate, may each and both be cancelled and set aside and held for naught, so far as this plaintiff's portion of the said real estate—to wit, the north half of the south-west quarter of section 33, township 19, range 8, east—is concerned; and that this plaintiff's title to the last-above described real estate be forever quieted against each and all of the defendants, and that each and all and every one of the defendants be forever enjoined from asserting or claiming any right or title or interest whatever in the last above-described real estate, or any part thereof. And this plaintiff further prays for any and all such other and further relief in the premises as may be equitable, proper, and just."

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EXHIBIT A.

HOMESTEAD CERTIFICATE No. 4060; APPLICATION 11,913.

United States of America, to all to whom these presents shall come —Greeting:

Whereas, There has been deposited in the general land office of the United States a certificate of the register of the land office at Salina, Kansas, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto, the claim of Andrew J. Stainbrook has been established and duly consummated, in conformity to law, under act of 21st April, 1876, for the south-west quarter of section 33, in township 19, south, of range 8, east, in the district of lands subject to sale at Salina, Kansas, containing one hundred and sixty acres, according to the official plat of the survey of said land returned to the general land office by the surveyor-general, the said tract was, on the 28th day of May, 1874, certified to the State of Kansas, for the benefit of the Atchison, Topeka and Santa Fé R. R. Co.

Now, therefore, know ye, that there is granted by the United States unto the said Andrew J. Stainbrook, the tract of land above described, to have and to hold the said tract of land, with all the appurtenances thereof, unto the said Andrew J. Stainbrook and to his heirs and assigns forever, the aforesaid certificate to the State of Kansas, to the contrary notwithstanding.

In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the general land offiec to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the independence of the United States the one hundred and third.

R. B. HAYES.

By W. H. COOK, Secretary.

A summons was served on Jane Emslie personally, and on N. S. Goss and John Emslie by leaving duly-certified copies thereof at their usual place of residence. On the first day of the term, May 4, 1880, judgment was rendered in accordance with the prayer of the foregoing petition.

Eight days thereafter, at the same term of court, the defendants appeared in said cause, and made the following motion (court and title omitted):

"The defendants and each of them move the court to set aside and vacate the judgment, order and decree rendered herein at this term; to grant a new trial herein; to permit and allow the defend-

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ants to answer upon the payment of all costs, or on such terms as may be proper.

"1. That the judgment of the court is not sustained by sufficient evidence.

"2. That the judgment of the court is contrary to law.

"3. Error of law occurring at the trial, and apparent of record.

"4. Irregularity in the proceedings of the court, in this, that the said cause was not set for trial, but a default was taken on the first day of the term.

"5. That no evidence was heard on the trial thereof.

"6. For the reason that there was no sufficient summons or service thereof issued or served against defendant Goss.

"7. For reasons appearing in the affidavit of Joseph G. Waters, this day filed herein, and which will be read.

"J. G. WATERS, Attorney for Defendants."

The affidavit referred to is as follows (court and title omitted):

"Joseph G. Waters, being first sworn, on his oath says: That he is an attorney for defendants in the above action; that the defendants and each of them have a valid and meritorious defence to the plaintiff's cause of action; that the defendant John Emslie is the owner of the land sued on; that he paid the full value of the land to N. S. Goss, the defendant herein, and executed back to him a mortgage; that upon the service of summons on him, John Emslie, he did not understand its meaning, and, expecting the defendant Goss would attend to the matter, failed to appear and defend; that he, the said John Emslie, as a matter of fact, did not know or understand that there was a suit in court to be tried until some one told him on the street that there was such a case, and that judgment had been rendered against him; that he, the said Emslie, desires to file an answer, and is willing to pay all the costs; that the said N. S. Goss is an unmarried man, and has been absent from Woodson County, Kansas, before, at the time and continuously since the service of summons herein, as shown by the summons of the sheriff of Woodson County; that he has been absent from the State of Kansas and the United States during said time; that he has had no personal or actual knowledge of the pendency of this suit; that S. P. Young wrote to said Goss at Neosho Falls a letter, before the pendency of this suit, informing him that he would in a short time institute such a suit, and asking him if he would enter his appearance therein; that the said Goss forwarded said letter to Ross Burns and this affiant, with instructions to enter his appearance or not, as the said Burns and this affiant pleased; that since said time the said Goss has had no personal or actual knowledge of the pendency of this suit, or of the proceedings had therein; that he has not such knowledge now; that the said Goss has a good defence to said action; that John Emslie is the owner of said land, and said Goss has an unpaid mortgage thereon, as stated in plain-

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tiff's petition; that he asks for leave to answer instanter, and is ready and willing to pay all costs and go to trial at once.

"JOSEPH G. WATERS.

"Subscribed and sworn to before me, this 12th day of May, 1880. P. J. NORTON, Clerk District Court."

On the day last aforesaid the motion and affidavit were read, and there being no other testimony offered on either side, the court pro forma overruled the motion; to which ruling the defendants excepted, and have brought the case here for review.

Ross Burns, for plaintiffs in error.

Carswell & Sanders and S. P. Young, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.—Passing over the questions of practice and the matters of minor importance presented for our determination, we reach the principal subject of controversy, which is, does the petition sustain the judgment? The judgment is based wholly upon the averments of the petition, and if the petition does not state facts sufficient to constitute a cause of action, the judgment must be reversed.

The facts, as shown by the petition are briefly these: The land in controversy was, in 1863, public land, open to homestead settlement. In October, 1863, one Randall homesteaded it, and in 1868 he abandoned it. In June, 1869, the line of the railroad of the Atchison, Topeka and Santa Fé R. R. Co. was definitely located opposite to the land, which is within four miles of such located line, and is an odd-numbered section. At the time of such definite location the land was abandoned, but the entry of Randall's homestead was uncancelled. On November 3, 1869, a withdrawal of lands was made, within the limits of which withdrawal this land is situate. In May, 1874, this land was certified to the State of Kansas, and in February, 1875, patented by the State to the railroad company. In October, 1871, one Stainbrook had Randall's entry cancelled, and he himself homesteaded the land; but his entry was, an the application of the railroad company, afterward cancelled, and was only reinstated under the act of Congress of April 21, 1876. Stainbrook obtained a patent and sold to Young, who brought this suit. The act of Congress is referred to in the petition. By this act there was granted to the State of Kansas, in trust for the Atchison, Topeka and Santa Fé R. R. Co., for the purpose of aiding in the construction of its railroad, every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road, and it was therein provided that in case the United States have, when the lines of said road are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United

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States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States, so much land in alternate sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of preëmption or homestead settlement have attached as aforesaid.

In the case of the L. L. and G. R. R. Co. *v.* United States, 2 Otto, 741, the court, construing this act, says: "It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant in præsenti. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the State of Kansas, though a survey of lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed." There is, therefore, only one question to be considered. Upon the definite location of the line of the railroad of the Atchison, Topeka and Santa Fé R. R. Co., under the act of Congress of March 3, 1863, did the grant attach to an odd-numbered section within the ten-mile limit, upon which there was an abandoned but uncancelled homestead entry? The line of the road was definitely located June 30, 1869. At that date there was no valid subsisting homestead entry upon the land. It is true Randall had made a homestead filing on October 21, 1863, but he had, in 1868, abandoned the land as a homestead, and as no subsequent entry or filing was made prior to the time the line of the road was definitely fixed, the land belonged to the railroad company, as no valid or bona fide homestead claim then existed or attached. The right of Randall having been by him forfeited voluntarily, his claim had lapsed, and did not exist. At the time of the location, there was no person who could hold or exercise any claim under the entry or filing of Randall, and therefore there was no subsisting claim capable of being perfected.

It is urged, however, that the claim of Randall, although abandoned before the location of the road, yet, because it was then uncancelled, had sufficient force and validity to take the land from the railroad company. In brief, that a forfeited and abandoned homestead claim, simply uncancelled upon the books of the land office, has the like effect to exclude land from the railroad grant as a subsisting valid homestead claim, capable of being perfected and of ripening into an absolute title. Such an interpretation of the act of 1863 is not sustained by the letter or spirit of the statute. The

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act does not speak of entries or filings as excepting lands from the operation of the grant, but of rights—the right of preëmption and homestead. The spirit of the act was to protect preëmption and homestead settlers, having valid and subsisting rights at the time the grant became certain. It was not the intention of Congress, by the exceptions in the act, to exclude lands from the grant upon fraudulent or forfeited entries or filings. In our opinion, the land having been abandoned as a homestead claim when the route of the road was fixed, no right of homestead settlement attached to the land, within the meaning of the act, at the date of the location of the road; and that at such location the grant attached to the land, notwithstanding the non-cancellation of the homestead filing of Randall. This conclusion leads us to decide that the land in controversy belonged to the railroad company on May 20, 1874, when the deed was executed to N. S. Goss, and that the defendant, John Emslie, is the owner of the land, subject to the mortgage lien of his grantor. (A., T. and S. F. R. R. Co. *v.* Catlin, Copp's Pub. Land Laws No. 411, p. 394; Western Pacific R. R. Co. *v.* Spratt, id. No. 428, p. 416; Sayre *v.* A., T. and S. F. R. R. Co., id. No. 414, p. 397; M., K. and T. R. R. Co. *v.* Block, id. No. 412, p. 395.)

The rulings of the land department have not been uniform in its interpretation of the act of 1863, or other similar grants. The decisions of the land department until the Boyd case, April 28, 1871 (2 Lester's Land Laws, 26), were without exception, that upon the abandonment of an entry by a preëmptor or a homesteader, if the land was within a grant made subsequent to the entry abandoned, the land fell to the grant, and this in accordance with the rules of law touching the devolution of estates. In the Boyd case, the rule of decision was there explained to be, in an opinion of the assistant attorney-general, approved by the secretary, that, "there having been a subsisting homestead on the land when the rights of the railroad company attached, on the subsequent abandonment of the homestead, the land reverted to the government, and not to the company; and therefore it was, at the date of Boyd's application to file for it under the preëmption laws, subject to such application, and his filing should have been allowed." This decision was, in May, 1872, modified in an opinion of the assistant attorney-general, made in the case of Starkweather *v.* A., T. and S. F. R. R. Co., and approved by the Secretary. It states that "the homestead entry, in order to exclude the land filed on from the granted indemnity limits, should be a valid and bona fide homestead claim at the time the line of the road is definitely fixed. (A., T. and S. F. R. R. Co. *v.* Catlin, supra.) This was followed by a decision made in August, 1872, in the case of Railroad Co. *v* Svenson and Thurston, as follows: "The act of 1857 exempts from the grant, in place of lands to which the right of preëmption has attached at the date of the location of the road, and by the settled

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construction of this department the same rule applies to indemnity selections. I understand the phrase, 'right of preëmption has attached,' to mean not only a right of preëmption which had at some previous time attached, but also such a right as was subsisting at the date of the location of the road. In the Spratt case, supra, it was decided that "a preëmption claim may be defined to be a right or interest subsisting under the preëmption law, in some person, to a tract of public land, which by a further full compliance with the law may be ripened into a perfect title. It is essential in a bona fide preëmption claim that it subsist in some person, and that it be capable of being perfected." (M., K. and T. R.R. Co. *v.* Block, supra.)

In the case of Sayre, supra (1873), it was decided that a homestead entry, made before the definite location of the road, but which had been relinquished in writing before such definite location, although the entry was not cancelled until after location, did not take the land from the railroad. In February, 1877, it was decided, in the case of Thomas *v.* Railroad Co., that "lands situated within the limits of a road above indicated, covered by homestead entries at the date of the granting act, which entries are subsequently cancelled, are excepted from the operations of the grant." Under many of the decisions of the land department, prior to the passage of the act of Congress of April 21, 1876, confirming preëmption and homestead entries on public lands within the limits of railroad grants, it would seem that the entry of Stainbrook would have been held erroneous. Upon his appeal from the decision of the commissioner of the general land office, refusing to reinstate his homestead entry, the Secretary of the Interior reversed the decision of his subordinate, upon the ground that the application of reinstatement was made under the act of 1876. Upon this point the Secretary says:

"The tract in question was covered by a homestead entry, valid at its inception, and uncancelled at the time the grant became effective; hence, under the ruling established by my predecessor in the case of Chalkley Thomas, the same would have been excepted from the operation of said grant, and subject to appropriation by Stainbrook. His entry was cancelled, however, under a ruling of the land department in force at the date of adjudication, and on that point must be considered res adjudicata, and if the application had been based upon that ground it must have been rejected. The application, however, was made under the provisions of the act of April 21, 1876, and was based upon the ground of an entry allowed under the rulings of the land department, and has been adjudicated in accordance therewith. In the adjudication of the application under the act above mentioned, the rule established in the Thomas case—viz., that an unimpeached homestead entry will be considered valid until cancelled—will be followed."

The decisions of the land department, having been so various,

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changeable and conflicting relative to the interpretation of the land grants of Congress and the rights of preëmption and homestead settlers thereunder, cannot greatly guide us in reaching the true construction of the statute; much less can we regard such decisions as conclusive, or the decision of the Secretary of the Interior, in this case, as res adjudicata. Further, we think the reinstatement of the Stainbrook entry under the provisions of the act of 1876 was a mistake of law, as the title of the railroad company vested in the particular tract on June 30, 1869, by the route of the road being then definitely fixed. This vested title could not be disturbed by a subsequent act of Congress. (A., T. and S. F. R. R. Co. *v.* Bobb, ante, p. 673; Minter *v.* Crommelin, 18 How. 87; Reichart *v.* Felps, 6 Wall. 160; Morton *v.* Nebraska, 21 Wall. 660–675; Marquez *v.* Frisbie, 101 U. S. 473.)

The judgment of the district court will be reversed, and the case remanded for further proceedings in accordance with the views herein stated.

All the justices concurring.

See note, p. 451.

THE ATCHISON, TOPEKA AND SANTA FÉ R. R. CO.

v.

WILLIAM ROCKWOOD.

(25 *Kansas Reports*, 292. *January Term*, 1881.)

A certain piece of land in Chase County, Kansas, was on March 3, 1863, and subsequently (except for the facts hereafter stated), a part of the public lands of the United States, and was a part of the lands granted by the acts of March 3, 1863 (12 U. S. Stat. at Large, p. 772), and July 26, 1866 (14 U. S. Stat. at Large, p. 289). It was situated within ten miles of the line of the road of the Atchison, Topeka and Santa Fé R. R. Co., one of the beneficiaries of the first grant, and within twenty miles, but not within ten miles, of the line of the road of the Missouri, Kansas and Texas Ry. Co., the beneficiary of the other grant. On December 3, 1866, the line of the M., K. and T. Ry. Co. was definitely located, while the line of the A., T. and S. F. R. R. Co. was not definitely located until March 8, 1869. But the land was never selected by or for the M., K. and T. Ry. Co.; but on the contrary, the M., K. and T. Ry. Co. united with the A., T. and S. F. R. R. Co. in asking that the Secretary of the Interior should certify the land to the State of Kansas for the benefit of the A., T. and S. F. R. R. Co., which the Secretary afterward did. *Held*, that the M., K. and T. Ry. Co. never obtained any interest in this specific piece of land; that although said grants were in præsenti, yet they did not attach to any specific piece of land until the line of the road of the beneficiary railroad company was definitely located; and not then to the indemnity lands, which were situated more than ten miles and less than twenty miles from the railroad, but only to such lands when they were selected for such

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beneficiary at the instance and under the supervision of the Secretary of the Interior.

On April 3, 1867, the Secretary of the Interior, in accordance with said act of July 26, 1866, and for the benefit of said M., K. and T. Ry. Co., withdrew from market a large amount of land, including the specific piece of land now in controversy. *Held*, that this withdrawal did not of itself and alone affect any right or interest of the A., T. and S. F. R. R. Co. in and to any lands within its grant. The withdrawal was simply intended to prevent persons who had no interest in the lands, or no interest prior to that of the Missouri, Kansas and Texas Ry. Co., from acquiring any such interest, and not to prevent persons who did have some interest in the lands prior to that of the Missouri, Kansas and Texas Ry. Co. (as the Atchison, Topeka and Santa Fé R. R. Co. had) from perfecting such interest. And further, *held*, that this withdrawal did not prevent the A., T. and S. F. R. R. Co. from definitely locating its road and taking title to all lands situated within ten miles of its road, and coming within the terms of its grant.

After both of said grants had been made, after the lines of both of said railroads had been definitely located, after the lands, including this specific piece of land, had been twice withdrawn from market, from sale and preëmption, once being withdrawn in favor of the M., K. and T. Ry. Co., and once—to wit, on November 3, 1869—being withdrawn in favor of the A., T. and S. F. R. R. Co., R. then—to wit, on June 22, 1871—settled upon the land as a preëmptor. Afterward both the A., T. and S. F. R. R. Co. and R. perfected their titles and obtained patents for the land; the A., T. and S. F. R. R. Co. from the State of Kansas, and R. from the United States. *Held*, that the title of the A., T. and S. F. R. R. Co. is paramount to that of R., and R. being in possession of the land, the railroad company is entitled to recover the same from him.

Error from Chase District Court.

Ejectment, brought by the Atchison, Topeka and Santa Fé R. R. Co. against Rockwood, for the recovery of the north-east quarter of section 31, in township 19, south, of range 8, east, in Chase County.

Trial, and judgment for the defendant, at the May term, 1880, of the district court the plaintiff brings the case here. A statement of facts appears in the opinion.

Ross Burns, for plaintiff in error.

W. S. Romigh and Sterry A Sedgwick, for defendant in error.

Valentine, J.—This was an action of ejectment, brought by the Atchison, Topeka and Santa Fé R. R. Co. against Wm. Rockwood, for the recovery of a certain piece of land. The case was tried on an agreed statement of facts, and judgment was rendered in favor of Rockwood. The railroad company now brings the case to this court, and asks for a reversal of said judgment.

On March 3, 1863, an act of Congress was passed, granting lands to the State of Kansas to aid in the construction of certain railroads therein designated. (12 U. S. Stat. at Large, p. 772.) The land in controversy was at that time and before a part of the public lands of the United States, and is a part of the lands intended to be granted by said act, and is situated within ten miles of the railroad of the plaintiff in error. This act grants every alternate odd-num-

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bered section of land within ten miles on each side of the railroad. This is the extent of the grant; but to make up for any deficiency in the lands thus granted, the act also provides that, "in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States," in alternate odd-numbered sections, other lands, not further than twenty miles from the line of said road, sufficient to make up the deficiency. On February 9, 1864, the State of Kansas accepted this grant, and made the plaintiff in error the beneficiary thereof for all lands granted on the route from "Atchison via Topeka to the western line of said State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where said road crosses the Neosho down said Neosho Valley," etc. (Laws of 1864, p. 150, § 3.) On March 19, 1866, the plaintiff in error and the Union Pacific Ry. Co., southern branch (a then existing corporation, of which the Missouri, Kansas and Texas Ry. Co. is the successor), entered into an agreement by which the plaintiff transferred to the Union Pacific Ry. Co., southern branch, all its right to build a railroad down the Neosho Valley, together with all its interests in and to the lands granted to it to build its branch down the Neosho Valley. This agreement was approved and ratified by the proper authority.

On July 26th, 1866, an act of Congress was passed, granting lands to the State of Kansas to aid in the construction of the southern branch of the Union Pacific Ry., from Fort Riley, Kansas, toward Fort Smith, Arkansas, down the Neosho Valley to the southern line of the State. (14 U. S. Stat. at Large, p. 289.) This act grants five alternate odd-numbered sections on each side of the railroad per mile. It contains the same provisions, substantially, for supplying a deficiency in the lands granted, as is mentioned in the act of 1863. It also contains this further proviso:

"Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States."

Section 4 of the act made it the duty of the Secretary of the Interior to withdraw from the market "the lands granted by this

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act," upon the company's filing a map of its line, designating the route of its road.

On December 3, 1866, the Union Pacific Ry. Co., southern branch, made a definite location of its line of road, opposite to the land in controversy, and on April 3, 1867, the Secretary of the Interior withdrew from market a large amount of land, including the land in controversy, for the benefit of said Union Pacific Ry. Co., southern branch. The land in controversy was not within ten miles of the definite location of the road of the Union Pacific Ry. Co., southern branch, but was within twenty miles of the line of such road.

On March 8, 1869, the plaintiff in error located the line of its road opposite the land in controversy; and on November 3, 1869, the Secretary of the Interior, by a letter dated October 23, 1869, withdrew from market, in favor of the plaintiff in error, a large amount of land, including the land in controversy. This land was situated within ten miles of the plaintiff's road.

On June 22, 1871, the defendant in error settled upon the land in controversy, as a preëmptor. On May 16, 1872, the commissioner of the general land office directed the officers of the local land office to cancel the entry and preëmption of the defendant, on the ground that the land had, before its entry, inured, under the provisions of the first-mentioned land grant, to the plaintiff in error; but through mistake (and without knowledge of this order on the part of the defendant), the local land officers permitted the defendant, on the 19th day of June, 1872, to complete his preëmption. The plaintiff in error fully completed its line of road to the western boundary of the State on December 23, 1872. The other road was also completed within proper time, in accordance with the provisions of the act of Congress of July 26, 1866. In January, 1873, the Missouri, Kansas and Texas Ry. Co. (successor of the Union Pacific Ry. Co., southern branch) and the plaintiff in error entered into an agreement with each other, by which it was agreed that the land in controversy, along with other lands, should be certified by the Secretary of the Interior to the State of Kansas for the benefit of the plaintiff in error. About this time, and on January 21, 1873, the Missouri, Kansas and Texas Ry. Co. selected its lands, more than ten miles from the line of its road, to make up for deficiencies in the amounts which it received within ten miles of the line of its road. It did not then select, and never selected, the land in controversy, which land has never been selected for it by any one else. On November 11, 1873, the Secretary of the Interior certified the land in controversy, along with other lands, to the State of Kansas for the benefit of the plaintiff in error, as the plaintiff in error and the Missouri, Kansas and Texas Ry. Co. had previously agreed that he should. On December 16, 1873, this land was patented by

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the State of Kansas to the plaintiff in error. The entry of the defendant was not in fact cancelled until February 5, 1875, at which time it was cancelled, as ordered by the commissioner of the general land office. In 1878 said cancellation was set aside, and the entry of the defendant was reinstated, and a patent for the land was issued to him by the United States. The defendant has remained in the actual possession of the land from the time he first settled upon it in June, 1871, up to the present time.

Upon these facts, the court below held that the plaintiff was not entitled to recover, and rendered judgment in favor of the defendant for costs.

We think under the foregoing facts that the Missouri, Kansas and Texas Ry. Co. never obtained any interest in the land in controversy. And where we use the name "Missouri, Kansas and Texas Ry. Co.," we shall mean to include the company, not only under that name, but also under its former name of "the Union Pacific Ry. Co., southern branch." The grant under which the Missouri, Kansas and Texas Ry. Co. received its lands was more than three years subsequent to the grant under which the plaintiff in error claims the land in controversy; and this subsequent grant, by the proviso already quoted, excepted from the grant all lands which had been previously granted or reserved. Hence the Missouri, Kansas and Texas Ry. Co., as against the plaintiff in error, could claim nothing from the grant alone, independent of all subsequent transactions; and we think no subsequent transactions have been had which could give such railway company any claim to the property in controversy, as against the plaintiff in error. It is true the Missouri, Kansas and Texas Ry. Co. definitely located its line of road first; but the land in controversy was not situated within ten miles of the line of its road; and hence such definite location did not have the effect to give to it any interest in the land. In order to give such company any interest in lands situated more than ten miles from the line of its road, as the land in controversy was and is, three things at least were necessary:

1. It was necessary that the road should be definitely located.

2. It was also necessary that there should be a deficiency in the amount of land which the railroad company received within the ten-mile limit.

3. And it was also necessary, in order to give it any interest in any specific lands beyond the ten-mile limit, that such lands should be selected for it at the instance and under the supervision of the Secretary of the Interior. (See § 1 of said act of 1866, and Ryan *v.* R. R. Co., 99 U. S. 386.)

Now, while the company did definitely locate its road, and while there was a deficiency in the amount of land which it received within the ten-mile limit, yet the land in controversy was never

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selected for the Missouri, Kansas and Texas Ry. Co.; and the company never asked that any such selection should be made, but on the contrary, it asked that such land should be certified to the State of Kansas for the benefit of the plaintiff in error. The Missouri, Kansas and Texas Ry. Co. never claimed any interest in the land in controversy, and does not now claim any such interest, and we are satisfied that it never had any interest therein.

But the main question is, has the plaintiff in error ever obtained any interest in the land in controversy? It must be admitted that it has, unless the withdrawal of the land from market by the Secretary of the Interior, on April 3, 1867, had the effect to prevent the plaintiff in error from acquiring any such interest. The defendant in error claims that this withdrawal had such effect. He claims that it had such effect by virtue of the words, "or that the same has been reserved by the United States for any purpose whatever," found in the first section of the grant of 1863. This withdrawal of the land in controversy, and of all other lands situated more than ten miles from the line of the road of the Missouri, Kansas and Texas Ry. Co., was for the purpose that such company might select lands to make up any deficiency of lands received by it within the ten-mile limit.

We shall suppose that the Secretary of the Interior had the right at this time, and for such purpose, to withdraw lands which were more than ten miles from the line of the Missouri, Kansas and Texas Ry. Co.'s road, as well as to withdraw lands which were within ten miles of the road; and that, after such withdrawal, the Missouri, Kansas and Texas Ry. Co. had the right to select from such lands, so as to obtain a priority in right to the lands thus selected over the plaintiff in error—though this is questionable. But the Missouri, Kansas and Texas Ry. Co. never did select, nor have selected, the land in controversy; hence the company never obtained, by selection, any interest in such land, and hence this land was left as though no such withdrawal had ever taken place. It does not appear from the record, or elsewhere, that the Secretary of the Interior attempted to withdraw these lands so as to affect any right or interest of the plaintiff in error. That portion of the agreed statement of facts concerning this subject, which really gives us all the information we have concerning the matter, reads as follows:

"21. That on the 3d day of April, 1867, the Secretary of the Interior, in accordance with the provision of said act of Congress, approved July 26, 1866, and which said act, as it appears in the statutes of the United States, is made a part of this agreement, withdrew from market, for the purpose of securing the same in order to carry out the purpose and provisions in said last-mentioned act, stated and recited and in accordance therewith, all the lands which were at that time lands belonging to the United States, and which

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were situated within twenty miles from the located line of said railroad of said Union Pacific Ry. Co., southern branch, except the even-numbered sections, in the first ten miles of the said line of road."

The withdrawal was simply intended to prevent persons who had no interest in the lands, or no interest prior to that of the Missouri, Kansas and Texas Ry. Co., from acquiring any such interest, and not to prevent persons who did have some interest in the lands, prior to that of the Missouri, Kansas and Texas Ry. Co. (as the plaintiff in error in this case had) from perfecting such interest. The withdrawal was strictly under the provisions of the grant of 1866, as appears from that portion of the agreed facts above quoted; and that grant, by its express terms, was to operate in subserviency and in subordination to all previous grants and reservations; hence this withdrawal was itself in subserviency and in subordination to the plaintiff's grant. It was not to take away or reserve the land in controversy, or other lands like it, from the plaintiff in error, and it did not and could not affect any interest which the plaintiff had or might obtain in and to the lands. We do not wish, however, to say (or to express any opinion upon the subject) that if the Missouri, Kansas and Texas Ry. Co. had selected this land before the plaintiff in error had definitely located its road, that the plaintiff in error would then have had the right to take the land. We only wish to say that the withdrawal did not operate to prevent the plaintiff from receiving and procuring any lands belonging to the United States, and otherwise subject to the plaintiff's grant, which had not yet been selected by the Missouri, Kansas and Texas Ry. Co. We think that such lands were subject to the plaintiff's grant the same as though no such withdrawal had ever been had. It does not appear that the withdrawal was intended to affect the plaintiff's grant. According to the decisions made by the supreme court of the United States, and followed by this court, these grants were in præsenti, creating an immediate interest in the lands granted. Leavenworth, etc., R. R. Co. *v.* United States, 92 U. S. 733; Missouri, etc., R. R. Co. *v.* K. P. Ry. Co., 97 U. S. 491; A., T. and S. F. R. R. Co. *v.* Bobb, 24 Kas. 673; Emslie *v.* Young, 24 Kas. 732; K. P. Ry. Co. *v.* Dunmeyer, 24 Kas. 725.

There were other things necessary to be done, however, before the grants attached to any definite or specific piece of land, and in all these things the plaintiff in error has priority over the Missouri, Kansas and Texas Ry. Co. The grant itself to the plaintiff in error was anterior and prior to that of the Missouri, Kansas and Texas Ry. Co., and the plaintiff in error, by the definite location of its road (the land in controversy being within ten miles of its road), caused its grant to attach to the specific land in controversy,

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while the Missouri, Kansas and Texas Ry. Co. never did anything to cause its grant to attach to the specific land in controversy.

Just prior to this definite location of the plaintiff's road, the land in controversy was free from any specific appropriation under either grant or to either railroad company, but was subject to both grants. It is possible that the Missouri, Kansas and Texas Ry. Co. might at that time have appropriated it to itself by selection, but it did not do so; and the plaintiff in error then appropriated it to itself by definitely locating its road. As soon as the plaintiff in error definitely located its road, the title to this land and all other lands in odd-numbered sections within ten miles of the road, not held by any right paramount to that of the plaintiff, would at once vest in the plaintiff, and by relation would become its property as of the date of the act of 1863. (92 U. S. 748, 749; 97 U. S. 498.)

The defendant certainly has no right to the land in controversy. He took possession thereof after it had been twice withdrawn from market—after it had been withdrawn from preëmption entry and sale; after the plaintiff had definitely located its road opposite the land, and after the plaintiff's right to it had fully accrued. We think the plaintiff is legally the owner of the land. Even if some irregularities intervened in obtaining its ownership, still we would hardly think that the defendant could complain. Where one of two parties is entitled to a piece of land (as one of the two railroads in this case was), even if the wrong party should get the land, a third party would hardly have the right to complain.

Before closing this opinion, we might say that in this State, as well as elsewhere, the plaintiff in ejectment must recover, if he recover at all, upon the strength of his own title; but in this State the plaintiff in ejectment is not required to have the legal title, or all the title, or a title paramount to the title of all others, in order to enable him to recover. All that is necessary in order to enable him to recover is, that he shall have some kind of estate in the property in controversy, legal or equitable, and that his title to the property shall be paramount to that of the defendant. Simpson *v.* Boring, 16 Kas. 248, 251, and cases there cited; Stout *v.* Hyatt, 13 Kas. 232, 241; O'Brien *v.* Wetherell, 14 Kas. 622. We think the plaintiff in this case has that kind of title.

The judgment of the court below will therefore be reversed, and cause remanded with the order that judgment be rendered for the plaintiff.

All the justices concurring.

See note, p. 451.

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The Missouri, Kansas and Texas Ry. Co.

v.

Amos Noyes.

(25 *Kansas Reports*, 340. *January Term*, 1881.)

Under the act of Congress of July 26th, 1866, granting lands to the State of Kansas to aid in the construction of the southern branch of the Union Pacific railway and telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas, when the line of the railroad was definitely located, the title of the railway company to the odd sections within the ten-mile limit became, ipso facto, fixed and absolute. With respect to the land in the indemnity territory, commonly called "lieu lands," the right of the company was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed by the act.

Where N., having the qualifications therefor, made a homestead entry for eighty acres of public land, and within the indemnity territory, from which the deficiency in the ten-mile limit was to be supplied to the railway company, under the act of July 26, 1866, prior to any withdrawal of the lands from market or entry, and before such tract had been selected to help satisfy any deficiency, and afterward, and while N. was in possession of the land under such entry, and after he had complied with all the provisions of the homestead act, the Secretary of the Interior selected the tract to supply a deficiency in the odd section of land in the ten-mile limit, and the railway company, upon such selection, obtained a patent from the United States therefor, *held*, that the selection and the issuance of the patent were without authority of the statute, as N. had, under his homestead entry and compliance with the provisions of the homestead law, the paramount right to the land.

Error from Chase District Court.

Action by Noyes against The Missouri, Kansas and Texas Ry. Co. to quiet his title to certain land in Chase County. The petition, omitting court and parties, is as follows:

"1st. And now comes plaintiff, by his attorney S. N. Wood, and says, that the defendant is a corporation, incorporated under the incorporation laws of the State of Kansas.

"2d. That plaintiff is a citizen of the United States, over the age of twenty-one, and the head of a family, and has been for eight years last past.

"3d. That in February, 1867, plaintiff entered, under the laws of the United States to wit—the acts of Congress approved May 20, 1862, and March 21, 1864, entitled 'An act to secure homesteads to actual settlers on the public domain'—at the land office at Junction City, Kansas, the east half of the south-east quarter of section eighteen (18), township eighteen (18), of range eight (8), east, in

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Chase County, and paid $10 and the office fees; and that at the time he was residing upon said land with his family, and has continued to reside upon said land and cultivate it ever since.

"4th. That on the 24th day of March, 1873, being over five years and under seven years after he had entered said land, he submitted his final proof and paid the last fees, and obtained his final certificate No. 575, and passed upon application No. 1806; and that plaintiff complied with the law in every particular.

"5th. That since the 24th day of March, 1873, the honorable Secretary of the Interior, without any authority of law, selected said land for the use and benefit of the Missouri, Kansas and Texas Ry. Co., without the authority of law for the same.

"Wherefore plaintiff prays that he may be quieted in his title to said land, and that the defendant herein be forever barred as to all right, title or interest in said land, with costs of suit."

The defendant filed an answer, setting up various defences. The action was tried at the May term, 1878, of the district court, without a jury, upon the following agreed statement of facts:

"It is hereby stipulated, and agreed by and between the plaintiff and defendant above named, that, subject to all legal objections to the sufficiency of the petition filed in said cause now here made by the defendant as constituting no cause of action against it, and the like objection against the answer now here made by the plaintiff for like reasons, the following are the facts in said cause subject to such objections as may be made by either party to said action and exceptions to be preserved to the rulings thereon.

"1st. That all the allegations of fact in said petition set out are true, except the fifth paragraph or subdivision thereof, and any legal conclusion or allegation of law in said petition contained.

"2d. That the homestead entry of the plaintiff as alleged in his petition was on the 22d day of July, 1873, cancelled by the order and decision of the Secretary of the Department of the Interior of the United States.

"3d. That the land described in said petition is situated more than twelve miles from the line of the defendant's railway, and within twenty miles' limit therefrom, and within the indemnity limits provided by the grant of lands to defendant as alleged in the answer of the defendant in this action.

"4th. That parallel to the said land the defendant's line of definite location was made and established on the 29th day of September, 1866, and a map thereof was filed in the office of the Secretary of the Interior, December 3d, 1866.

"5th. That on the 1st day of April, 1867, the honorable the Secretary of the Department of the Interior of the United States ordered the withdrawal of the said land, among others, from market and homestead entry.

"6th. That the allegations of the answer of the defendant, ex-

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cepting the allegations of general denial, are true, excepting conclusions of law in said answer contained.

"7. That one Asa Hull set up a claim to and made homestead entry of the east half of the south-east quarter of section eighteen, in township eighteen, of range eight, east, the same being the land described in the plaintiff's petition.

"That such homestead entry was made January 5, 1863, and afterwards—to wit, on the 26th of January, 1867—the said homestead entry was cancelled by the order of the Secretary of the Department of the Interior. This claim of Asa Hull, and homestead entry, and all proceedings thereunder, are objected to by defendant for the reason that the same are irrelevant and immaterial.

"8. That on January 5, 1876, the said land was patented by the United States to the defendant in accordance with selection theretofore made by the defendant, to wit, on the 3d day of September, 1875, which selection was on December 22, 1875, approved by the Secretary of the Interior.

"9. That plaintiff complied with all the provisions of the homestead law with reference to securing said land to himself.

"The conclusions of law to be made by the court from the above agreed statement of facts are to be reduced to writing, and the decision and judgment of the court made thereon, and such conclusions of law and judgment to be excepted to by the party prejudiced thereby and noted by the court.

"This stipulation to be filed by the clerk of said court with the record in this cause, and to be referred to by either party hereto."

The case was taken under advisement till February 8, 1879, when the court rendered its decision that at the commencement of the action the plaintiff was the owner and in possession of the land; that the defendant had no interest therein, and that the title executed by the Secretary of the Interior to the land was void. Judgment having been rendered barring the M., K. and T. Ry. Co. from setting up any title to the land, and adjudging it to pay all costs, it excepted, and has brought the case here.

D. Kelso, for plaintiff in error:

1. The admitted fact that Hull had entered this land, January 5, 1863, which entry was afterward cancelled by order of the Secretary of the Interior, does not help the defendant in error. The Secretary having annulled this entry, the presumption is that his decision was founded on good and sufficient grounds in law; and so far as Noyes is concerned, this decision is conclusive as to him. The entry of Hull being a nullity, and the land in question being public land, and the line of the company's road being definitely fixed on September 29, 1866, and opposite to it, prior to the entry of Noyes, and the map thereof being filed with the Secretary of the Interior, December 3, 1866, it follows that from this time the grant covered by the act of Congress of July 26, 1866, attached to the lands

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on each side of such line, and that in the month of February, 1867 —the date of the alleged entry of Noyes—the land was not subject to homestead entry. (23 Kas. 167, 174.)

The pretended entry by the defendant in error of the land in question, in February, 1867, was also cancelled by order of the Secretary of the interior, for the evident reason that the land was not then subject to homestead entry—it having before that time inured to the benefit of the railway company. But the defendant in error insisted in the trial court, and will now insist, that because the Secretary of the Interior had not withdrawn the land from market, and homestead and preëmption entry, in February, 1867, it was not embraced in the lands inuring to the benefit of the railway company at the time of its definite location, and that it was then subject to his homestead claim, and the Secretary's decision, as against him, is a mistake of law.

Our answer to this is, that the railway company's title to the land is derived from the act of Congress granting it, and is not subject to be defeated by the laches of a government officer in failing to discharge a duty enjoined on him by law. The language of the act is: "There is hereby granted," etc. It took effect when the line of the route of the railway company was definitely located, and, eo instanti, vested title in the company to the lands granted on each side of its road. (24 Kas. 673.)

As soon as the maps of such line were filed with the Secretary, the law made it his duty to withdraw the lands granted by the act. How? "In such manner as may be best calculated to effect the purposes of this act and subserve the public interest." The act nowhere provides that, should the Secretary fail to perform this duty, that the grant of land intended to be conveyed thereby should be inoperative and revert to the Government. (Act of July 26, 1866, § 2.)

The claim of Hull to the land having been cancelled, and he having abandoned it, the land was, at the time of the definite location of the railway, September 29, 1866, or when the maps thereof were filed in the office of the Secretary of the Interior, December 3, 1866, public land, and the grant to the railway company then attached. (24 Kas. 732.)

In deciding the claim of Noyes to this land adversely to him, the Secretary of the Interior simply followed the rule of the department as laid down in Boyd *v.* The B. and M. R. R. (Copp's Land Laws, 392).

S. N. Wood and C. M. Foster, for defendant in error:

On the facts agreed upon, it is clear that a homestead right in favor of Hull had attached to the land in controversy, and hence it was not included within the terms of the grant. The decision in the case of Boyd *v.* The B. and M. R. R. (Copp's Land Laws, 392), holds that, when a homestead right attached to land at the time of

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the grant, that in case of an abandonment of the homestead, the land reverted to the Government, and not to the said railroad company. This decision was afterward limited so as to hold that there must be a valid subsisting homestead right at the time the land grant took effect, in order to exempt the land from its operation. Under the agreed statement of facts it must be assumed that Hull's homestead entry was valid and in full force on the 3d of December, 1866, and hence not included in the grant.

But we claim further, that this land was never included within the land grant. The act of Congress under which the plaintiff in error claims, unlike other land grants, provides that the Secretary of the Interior shall withdraw the land granted by the act from market as soon as the company shall file with him maps of its line, designating the route thereof. This we understand to mean the land within the ten-mile limit. The act further provides that in case it shall appear after the line of said road is definitely located that any section or part thereof has been sold by the United States, or that the right of homestead or preëmption has attached to the same, that the Secretary of the Interior shall cause an equal amount of land to be selected nearest to such sections, and that such land shall be reserved and held for the use of the company by the Secretary of the Interior. This language does not give to the railway company any vested rights in land outside the ten-mile limit, until the same is selected by the Secretary of the Interior. The grant of Congress does not attach to the land until the selection. Now in this case the selection of land was not made until eight and a half years after the plaintiff's homestead entry, and long after he had made his final payment and proof.

On this proposition there does not seem to be any question to be settled; it is in fact not an open question. (Ryan *v.* R. R. Co., 99 U. S. 386.)

Plaintiff in error claims that it has title to this land, because it was the duty of the Secretary of the Interior to withdraw the land as soon as he received maps of the company's route. Very likely the railway company could have compelled, by mandamus, the Secretary of the Interior to withdraw the land or make the selection. But this was not done. We claim that the grant attached only after a selection of land had been made by the Secretary of the Interior, which could not be done until it was first ascertained what the deficiency was. The cases cited by counsel for plaintiff in error pass only on the question as to the time when the respective rights of the railway company and homesteads attach, and have no bearing on the questions in this case.

HORTON, C. J.—It is disclosed by the record that Noyes, possessing all the legal qualifications to enter and homestead a portion of the "public land," filed his declaratory statement and entered at the local land office the land in controversy, in the month of February,

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1867; and that afterward he complied with all the other provisions of the homestead law with reference to securing the land to himself. Notwithstanding these things, it is contended by the M., K. and T. Ry. Co. that the homestead entry was properly cancelled by the Secretary of the Department of the Interior on the 22d of July, 1873, and the land legally patented to the company on the 5th of January, 1876, under the provisions of the act of Congress of July 26, 1866, granting land to the State of Kansas to aid in the construction of the southern branch of the Union Pacific R. R. and telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas. The sections of the act which the railroad company claims as decisive in its favor are as follows:

"That for the purpose of aiding the Union Pacific R. R. Co., southern branch, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternative section of land, or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached, as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the

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United States: And provided, further, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

"SEC. 4. That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

The argument of counsel for the railway company, upon the statute is, that as the line of the road was definitely located on September 29th, 1866, on the ground opposite to the land in question, while it was public land, and before the entry of Noyes, and as a map thereof was filed with the Secretary of the Interior on December 3d, 1866, the grant covered by the statute attached to the lands on each side of the road, embracing both the ten-mile and the indemnity limits, and as the land was within the indemnity limit in February, 1867 (the date of Noyes's entry), it was not subject to homestead entry; that as the railroad company derived its title to the lands granted from the act of Congress, it was not subject to be defeated by the laches of a government officer in failing to discharge a duty enjoined by the act; that as the act required the Secretary of the Interior to withdraw all lands granted, on the filing of the map of the line of the road in his office, his refusal or failure to withdraw the land from homestead or other entry until after Noyes's entry does not affect the title of the company, or concern this controversy. The argument is fallacious and unsound, because its premises are not supported by the statute. When the road was definitely located, the right of the company to the odd sections within the ten-mile limit became, ipso facto, fixed and absolute. Its title thereto, which was previously imperfect, acquired precision, and became attached to the land. With respect to the indemnity, or "lieu lands," as they are called, and which are outside of the ten-mile limit, but within twenty miles from the line of the road, the right was only a float, and attached to no specific tracts until the selection was actually made by the Secretary of the Interior. To the land within the secondary or indemnity territory, from which the deficiency in the ten-mile limit was to be supplied, the railroad company had not and could not have any claims, until specially selected for the purpose of supplying the deficiency. (L. L. & G. R. R. Co. *v.* United States, 2 Otto, 741; Ryan *v.* R. R. Co., 99 U. S. 382; A., T. and S. F. R. R. Co. *v.* Rockwood, ante, p. 292.)

As Noyes made his homestead entry prior to any withdrawal of the land from sale or entry, and before any selection had been made of it to help satisfy a deficiency in the odd sections in the ten-mile limit, and as his homestead was a part of the "public lands" at such

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entry, the attempted selection afterward of this tract by the secretary to supply a deficiency was without authority of the statute. The patent issued to the company was without warrant of law. The various decisions of this court to which counsel of the railroad company refers are in no way in conflict with these conclusions.

Noyes has the paramount right to the land, and the judgment of the district court will be affirmed.

All the justices concurring.

See note, p. 451.

GEORGE W. GRINNELL, H. P. EMERY, JOHN ROBINSON, JOSEPH THORNICH, MARY L. BRUCE, A. HAMMOND, S. E. OGBORN, E. E. OGBORN, GEORGE ULRICH, W. D. PACKARD, JOHN SLATER, JACOB WEAKLINE, LYDIA DUNHAM, ANDREW WILFONG, ED. PENNISTON, GEORGE DARLING, A. L. BELL, CHARLES BROWN, EBENEZER TREFEY, VIOLETTA ROPER, B. H. LATHROP, JOHN BRUCE, S. B. S. DUNCAN, AND WILLIAM BRUCE

v.

THE CHICAGO, ROCK ISLAND, AND PACIFIC R. R. CO., CHARLES STUART, AND JOHN TOMLINSON.

(*United States Supreme Court. October Term*, 1881.)

Under the act of Congress of May 15, 1856, granting to a State, for the purpose of building a railroad, certain lands within fifteen miles of the then intended location, and the amendatory act of June 2, 1864, extending the limit to twenty miles, the land being then granted by the State to the railroad: *Held*, that a vested title to the lands passed by such act, which was not forfeited by a subsequent change of location of the road authorized by act of Congress; and that even if such change of location worked a forfeiture, the title remained in the road until proceedings by the parties to which the forfeiture accrued divested it, and such forfeiture cannot be asserted as a defence by a disseizor, but is a question entirely between the parties to the grant.

ERROR to the Supreme Court of the State of Iowa.

S. S. Henkle and John S. Hauke, for plaintiffs in error.

Thomas F. Withrow, for defendants in error.

MILLER, J.—This is a writ of error to the Supreme Court of the State of Iowa.

Actions in the nature of ejectment were brought by the railroad company against numerous persons in different courts of the State of Iowa, which, on appeals to the Supreme Court, where heard and decided together by stipulation, and the judgments in the lower courts in favor of plaintiff were affirmed.

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The plaintiff asserted title under the act of Congress of May 15, 1856, granting lands to the State of Iowa for railroad purposes, and the counsel of plaintiffs in error correctly states in his brief that the only question presented by the record is whether the railroad company has, under that grant, acquired title to any lands within the old fifteen-mile limits of the Mississippi and Missouri R. R. Co., certified to the State under the grant by the Department of the Interior for the benefit of that company, but which were left outside of the new twenty-mile limits by a change of location of the old line, made by the present company under the act of Congress of June 2, 1864, amendatory of the act of May 15, 1856.

The material facts on which the decision of this question depends may be thus succinctly stated: By the act of May 15, 1856, Congress made a grant to the State of Iowa for the purpose of aiding in the construction of four railroads across the State from points on the Mississippi River to points on the Missouri River. One of these was a road from Davenport to Council Bluffs. The grant was of every alternate section of land designated by odd numbers, for six sections in width, on each side of said roads; and in case it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any sections or parts of sections granted as aforesaid, or the right of preëmption had attached to the same, then the State, by its agent or agents, might select other odd sections in lieu of those thus deficient, within a limit of fifteen miles on each side of said roads.

The State of Iowa, by an act of its Legislature approved July 14, 1856, granted to the Mississippi and Missouri R. R. Co. the lands which were by the act of Congress appropriated to the construction of the road from Davenport to Council Bluffs. That company accepted the grant, and on the 11th day of September, 1856, filed in the General Land Office at Washington a map showing the route which it had adopted for its road, some unimportant corrections of which were made by another map filed April 1, 1857.

On the 4th of September, 1858, the agent of the company and the State reported to the General Land Office the selection of lands in lieu of those which had been sold or were otherwise deficient, and on the 27th of December, 1858, the lands thus selected and those which were in place were certified to the State of Iowa by the Commissioner of the General Land Office. These lands in place and lands selected and certified to the State under the act of 1856 include all the lands in controversy in this suit.

By an act approved July 2, 1864, Congress authorized a change of location of this road in the uncompleted part thereof, so as to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacific R. R., and the plaintiff corporation, which had succeeded to all the rights of the Mississippi

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and Missouri R. R. Co., availed itself of the privilege thus conferred, and so changed the route as to place it at some points south of the fifteen-mile limit of the grant, as ascertained by the first location, and the road was completed on this location to Council Bluffs in 1869. After all this the plaintiffs in error, who were defendants below, settled upon the lands in controversy, which were within the limits of the location made in 1856, and without the twenty-mile limit of the amendatory act of 1864, which will be presently noticed, and proceeded by the appropriate steps to assert rights under the homestead and preëmption laws of the United States. The officers of the land department refused to recognize their right to do so, but being in possession, and sued for it by the railroad company, they say the company has no title, because it lost whatever right it had to the lands by the change of the location, and because locating the road as now completed does not bring these lands within the limit of either the original grant or the amendatory act of 1864.

Two inquiries are thus suggested, namely: Had the railroad company acquired title or a vested right to the lands in controversy before the act of 1864, and before the change of location? And if it had, what was the effect of that change on the right of the company to the land left by the change outside of the limits prescribed by both acts?

The grant under the act of 1856 was, as has been often said, a grant in præsenti, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem of the location is the road, which by the terms of these grants is necessary to identify the sections granted on each side of it. Whenever that is done so that a surveyor or the officers of the land department can protract the line of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant.

So far as lands are found in place when this is done, not coming within the exceptions as sold or held under preëmption, the title, or at least the right to this land in place, is at once vested in the State or in the company to which the State has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer.

None of these difficulties arise in the present case. The location

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was made and the map filed in the land office, the selection of lieu lands was made and the selection approved, and the entire list was regularly certified to the State of Iowa as early as December, 1858, and with this certificate the last act of the United States which could in any event be held necessary to passing the title was performed, and either the State of Iowa or the railroad company—it is immaterial which for the purposes of this suit—had become invested with the full legal title to the lands so certified.

In this condition of affairs the Mississippi and Missouri R. R. Co. made a mortgage on its road and franchises, which also included the lands granted by Congress to the State and by the State to that company, to obtain money to build its road. It commenced at Davenport, on the Missouri, and had constructed the road westwardly one hundred and thirty miles when the act of 1864 was passed. In 1866 the mortgage above mentioned was foreclosed, and the Chicago, Rock Island and Pacific Co., under sale at this foreclosure proceeding, and by subsequent consolidation, became the owner of the road, the franchises and the lands of the Mississippi and Missouri Co.

The entire legal title, therefore, to their land had passed for a valuable consideration to this company.

Did their construction of the road on the new line annul or defeat, without further action on the part of the United States, the title thus vested? It would have been competent for Congress to have made it a condition of the change of location that the lands within the six miles, or the fifteen-mile limit of the old line, and not within the twenty-mile limit of the new line, should revert to the United States, so far as the title of the company was concerned. But it did not make any such condition. If no law had been passed authorizing the change of route, it is possible the government might have reclaimed these lands as forfeited by reason of the change, to which it had not consented. But Congress did consent to the change without any declaration affecting the title already vested in the company.

The second section of the act of 1864 provided for a grant of land on each side of the new location, and for lieu lands when those could not be found to an amount equal to that granted by the original act of 1856, and it extended the limit for selecting lieu lands to twenty instead of fifteen miles.

It is argued that the lands thus granted were intended as a substitute for those accruing to the company under the first location, and that the latter necessarily reverted to the grantor; that it was the policy of the government that the lands granted should be alongside of the road, and that the lands retained by the government should thereby be enhanced in value. We are not prepared to deny that if the railroad company had accepted or received lands under the act of 1864, and the case was unembarrassed by the rights

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of subsequent purchasers or mortgagees, the United States could, by a judicial proceeding, enforce the principle that an exchange of lands was intended.

But this would arise from no express language of the act of Congress or agreement with the company, but as a just and proper inference from the whole transaction.

There is, however, no evidence that the company ever received any land under the act of 1864, or asserted a claim to such land. It appears affirmatively that it never filed with the General Land Office a map of its new route until 1870, a year after the road was completed, and it is fair to presume that if it intended to assert a claim to land under the changed location, it would have filed its map when the change was made or determined on. We do not think the act can be construed to forfeit the lands to which they had title, when they claimed none under the act of 1864.

Another point equally fatal to plaintiffs in error is, that the assertion of a right by the United States to the lands in controversy was wholly a matter between the government and the railroad company, or its grantors. The legal title remains where it was placed before the act of 1864. If the government desires to be reinvested with it, it must be done by some judicial proceeding, or by some act of the government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding.

These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the government. Then the land would be subject to homestead or preëmption rights. But the legal title is not in the government, and, as we have already shown, the equity is more than doubtful. (Schulenberg *v.* Harriman, 21 Wall. 44; Tucker *v.* Ferguson, 22 Wall. 527.)

The judgment of the Supreme Court of Iowa is affirmed.

Affirmed.

The eight cases above reported constitute a very valuable contribution to our knowledge on the subject of grants of public lands to railroad companies. This branch of the law is indeed, to a very great degree, regulated by statute, so that each case as it arises turns for its decision almost wholly upon the construction of the particular legislative enactment involved. Congress has, however, seen fit to frame all the statutes passed by it upon this subject in pretty nearly the same manner. An opportunity is, therefore, afforded of stating in a general way the conclusions at which the courts have arrived in their adjudications on those statutes, and such is the aim of the present note.

Where a grant of land is made in aid of a railroad company, the act making the grant providing that no title shall pass until certain conditions are complied with, no vested right is acquired by the company until the conditions are fulfilled, and until that time the grant may accordingly be withdrawn or annulled. Rice *v.* R. R. Co., 1 Black. 358. Where, however, such conditions are complied with the title becomes an absolute one and Congress can-

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not, by subsequent legislation, impose any other qualifications, restrictions or conditions, with reference thereto. Counties of Cass, etc., v. Land, supra, p. 404.

And State taxation cannot be imposed upon lands granted by the United States until the right to a patent exists, all preliminary steps having been taken in accordance with the terms of the act making the grant. R. R. Co. v. Prescott, 16 Wall. 603; R. R. Co. v. McShane, 22 Wall. 444.

The grants by Congress of public lands in aid of railroads are not usually made directly to the railroad companies, but to the State or Territory in which the roads are situate, for the use and benefit of the companies. No specific lands are usually granted, but certain numbered blocks or sections of a specified size on either side of the projected road. The title to these lands vests in the companies it is said in præsenti. Rutherford v. Greene's Heirs, 2 Wheat. 196; Lessieur v. Price, 12 How. 59; Shulenberger v. Harriman, 21 Wall. 44. But the grant is indefinite in its nature, or, as it is called, a "float" until the road is actually located and return made to that effect. United States v. Percheman, 71 Pet. 51; Mitchell v. U. S., 9 Id. 711; U. S. v. Brooks, 10 How. 442; Ladega v. Roland, 2 Id. 581; Leavenworth, etc., R. R. Co. v. U. S., 92 U. S. 733; Miss., Kansas and Texas R. R. Co. v. Kansas Pac. R. R. Co., 97 U. S. 491; R. R. Co. v. Baldwin, 103 U. S. 426.

The following is the concise statement of the law on this point given in the case of Leavenworth, etc., R. R. Co. v. U. S., 92 U. S. 741: "'There be and is hereby granted,' are words of absolute donation and import a grant in præsenti. This court has held that they can have no other meaning; and the land department on the interpretation of them has uniformly administered every previous similar grant. They vest a present title, though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of road should be definitely located."

To a similar effect is the statement made in the opinion of the court in Shulenberger v. Harriman, 21 Wall. 44: "It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections to be afterwards located. When the route was fixed their location became certain, and the title which was previously imperfect acquired precision and became attached to the land."

Hence it is clear that all persons taking up land after the date of the grant do so subject to the right of way of the railroad company, in case the road be located over the ground thus taken up. St. Joseph, etc., R. R. Co. v. Baldwin, supra, p. 408. A fortiori is this true where such lands are taken up after the location. Simonson v. Thompson et al., 25 Minn. 450.

Persons, however, taking up land subsequent to the grant to the railroad and prior to the location thereof, are not ousted of their title. It is expressly provided by the acts of Congress that the railroad companies' claims shall not avail as against homestead claims, and others accruing prior to the location. Elmslie v. Young, supra, p. 422. If, however, such claims be abandoned before location no title can, of course, be set up under them. Ibid.

See, as to other instances of exceptions in grants to railroad companies, R. R. Co. v. Fremont, 9 Wall. 89; R. R. Co. v. Smith, Ibid. 95; Walcott v. Des Moines Co., 5 Wall. 681. See also Leavenworth R. R. Co. v. U. S., 92 U. S. 733, in which an exception of all lands reserved to the United States for any purpose whatever was held to include lands set apart for and occupied by an Indian tribe. As soon as the location is once fixed the right of the railroad company to the land granted becomes secure. No homestead claim thereafter

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filed is of any force or effect. Mo., Kans. and Texas R. R. Co. v. Kansas Pacific R. R. Co., 97 U. S. 497.

Nor does the failure of the Secretary of the Interior to withdraw the lands granted to the railroad company from the market until some time after the location in any way validate intermediate homestead or preëmption claims. R. R. Co. v. Bobb, supra, p. 412. Unless, indeed, the terms of the act seem to contemplate such withdrawal as in its nature a condition precedent to the full vesting of title in the railroad company. R. R. Co. v. Dunmeyer, supra, p.

In case the lands adjacent to the line of a railroad have been partly or wholly taken up prior to the location of the road, the company does not on this account lose the advantage of its grant. It is stipulated by the acts of Congress that in such event the company shall be entitled to select other lands in like amount at a greater distance from the line of the road. These lands are usually termed "lien" lands. They are not described at all in the acts, and are consequently to be regarded as "floats" until actually selected by the company. No title to them vests until such selection takes place. R. R. Co. v. Rockwood, supra, p. 432. ; R. R. Co. v. Noyes, supra, p.

All titles thereto, therefore, accruing prior to such selection are superior to that of the railway company even though they may have their inception after the location of the road. R. R. Co. v. Noyes, supra, p. 440. Unless, indeed, there has been a withdrawal of the lands by the proper authority from the market; in which case, of course, no title can be derived thereto. R. R. Co. v. Rockwood, supra, p. 432. When once the lien lands have been selected by the railway company its right thereto is fixed, and no title can subsequently be acquired under the homestead or preëmption laws. Ryan v. R. R. Co., 99 U. S. 382; Illinois Central R. R. Co. v. Co. of Union, 94 Ill. 71.

Where a grant of certain land is made to a railroad company by an act which provides that the road shall be constructed within a specified period, the mere failure to complete the road by that time does not ipso facto constitute a forfeiture by the company of the granted lands of which a disseizor is entitled to avail himself in ejectment against them. Schulenberger v. Harriman, 21 Wall. 44. And see R. R. Co. v. Smith, 9 Wall. 95; Hornsby v. U. S., 10 Id. 224; Marwick v. Andrews, 25 Me. 525; Guild v. Richards, 16 Gray, 309; Fairfax, Devisee, v. Hunter's Lessee, 7 Cranch, 631; Nicoll v. N. Y. and Erie R. R. Co., 12 N. Y. 121; Fremont v. U. S., 17 How. 460. The United States Government must intervene and set up the forfeiture before such a defence is allowable. The same principle applies where a company has a grant made to it of a "float," which by the location of the road and selection of the lien lands has become fixed, and afterwards said company changes the route of its road under authority of an act of Congress, by virtue of which a new "float" is granted to it. In such case no forfeiture of the lands first granted can be deemed to have been worked, and even if it had been no disseizor could have set it up as a defence. Grinnell v. R. R. Co., supra, p. 447.

Where a grant of land is made to a railroad company as a "float," and subsequently an act is passed authorizing a change in the location of the road by means of which the proposed line is shortened, a clause in the latter act providing that the company shall be entitled to "the same lands and to the same amount of lands per mile," will be construed as granting to it lands proportioned in amount to the decreased length of the line. C. R. & M. R. R. Co. v. Herring, 52 Iowa, 687.

The courts look with favor upon all compromises of disputes between railroad companies and claimants of lands granted to them. See as to the effect of such compromises, Atchison, Topeka and Santa Fé R. R. Co. v. Starkweather, 21 Kans. 822; R. R. Co. v. Dunmeyer, supra, p. 417.

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RICHARD PAINTON, Appellant,

v.

THE NORTHERN CENTRAL RY. CO., Respondent.

(83 *New York Reports*, 7. *November* 30, 1880.)

When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit.

An employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, but is not a guarantor of their safety; and in an action by an employee for alleged neglect to perform this duty, the onus is upon the plaintiff to show negligence.

Plaintiff, a brakeman in defendant's employ, was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. In an action to recover damages it appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant, or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to.

There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury.

(Argued October 11, 1880; decided November 30, 1880.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made the first Tuesday of May, 1877, reversing a judgment in favor of plaintiff, entered upon a verdict, and granting a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by plaintiff through the negligence of defendant.

Plaintiff was in the employ of defendant as a brakeman, and while in the discharge of his duties the brake he was operating gave way, and he was thrown from a car and injured.

The further facts appearing on the trial are set forth sufficiently in the opinion.

George B. Bradley, for appellant. It was the duty of the defendant, and it undertook, to provide suitable structures having in view the safety and protection of its employee while in the discharge of his duty. (Laning *v.* New York C. R. R. Co., 49 N. Y.

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521; Booth v. Boston & Albany R. R. Co., 73 id. 38, 40; Flike v. Boston & Albany R. R. Co., 53 id. 549; Ryan v. Fowler, 24 id. 410, 414; Corcoran v. Holbrook, 59 id. 517, 520; Kirkpatrick v. N. Y. C. & H. R. R. R. Co., Ct. App. Dec. 16, 1879; 9 Weekly Dig. 382; Kain v. Smith, Ct. App., April 6, 1880; 10 Weekly Dig. 176; Cone v. Del., L. & W. R. R. Co., Ct. App., June 1, 1880; 10 Weekly Dig. 232; Fuller v. Jewett, Receiver, etc., Ct. App., February 3, 1880, 21 Alb. Law Jour. 257; 9 Weekly Dig. 443–4; Hough v. Railway Co., 100 U. S. [10 Otto] 213; Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492; 8 Am. Rep. 661; Shauny v. Androscoggin Mills, 66 Me. 420; Gibson v. Pacific R. R. Co., 46 Mo. 163; 2 Am. Rep. 497; Cumberland, etc., R. R. Co. v. State, 44 Md. 283; Wedgewood v. C. & N. Ry. Co., 44 Wis.; 18 Alb. Law Jour. 137.) Plaintiff had the right to understand and assume that defendant had exercised care and diligence in providing suitable means for the service he was required to perform, so as not to expose him to unreasonable risks or dangers. (Connolly v. Poillon, 41 Barb. 366, 369; affirmed by Court of Appeals, 41 N. Y. 619; Noyes v. Smith, 28 Vt. 59; approved, 24 N. Y. 414; Jetter v. N. Y. & H. R. R. Co., 2 Abb. Ct. App. Dec. 458, 461; Ford v. Fitchburg R. R. Co., 110 Mass. 240; 14 Am. Rep. 605, 606; Gibson v. Pacific R. R. Co., 2 id. 500; 46 Mo. 163; Fort Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Toledo, etc., R. R. Co. v. Ingraham, 77 Ill. 309; Ford v. Fitchburg R. R. Co., 14 Am. Rep. [110 Mass.] 606.) The evidence fairly established and authorized the jury to find that negligence on the part of defendant caused the injury complained of. (Mullan v. P. & S. M. S. Co., 78 Penn. St. 25; S. C., 21 Am. Rep. 2; Greenleaf v. Illinois Central R. R. Co., 29 Iowa, 14; S. C., 4 Am. Rep. 181, 191–2.) It is not necessary to show that the defendant had actual knowledge or notice of the defect. It is sufficient that the defendant ought to have known or could, by the exercise of reasonable care, have ascertained the defective condition of the structure at the time it was made and applied to the car. (Gibson v. Pacific R. R. Co., 2 Am. Rep. [46 Mo.] 497, 503; Noyes v. Smith, 28 Vt. 59; Chicago & Alton R. R. Co. v. Platt, 89 Ill. 141; Wedgewood v. C. & N. W. R. R. Co., 44 Wis.; Connolly v. Poillon, 41 Barb. 366; affirmed by Court of Appeals, 41 N. Y. 619; Ryan v. Fowler, 24 id. 410, 414; Brickner v. New York C. R. R. Co., 2 Lans. 506, 512, 513; affirmed by Court of Appeals, 49 N. Y. 672; Fuller v. Jewett, Receiver, etc., Ct. App., Feb. 3, 1880; 21 Alb. Law Jour. 257; 9 Weekly Dig. 443; Kirkpatrick v. New York C. & H. R. R. R. Co., Ct. App., Dec. 16, 1879; 9 Weekly Dig. 382; Booth v. B. & A. R. R. Co., 73 N. Y. 38; Flike v. B. & A. R. R. Co., 53 id. 549, 553; Spelman v. Fisher Iron Co., 56 Barb. 151, 165; Hough v. Ry. Co., 100 U. S. 213, 220.) That state of facts was sufficient to cast the burden on the defendant of showing

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if such were the case that some care had been used by it. (Russell Manuf. Co. *v.* N. H. Steamboat Co., 50 N. Y. 121, 126–7; Wyckoff *v.* Queens Co. Ferry Co., 52 id. 32, 36; Platt *v.* Hibbard, 7 Cow. 498, 500, 501; Mullen *v.* St. John, 57 N. Y. 567; Byrne *v.* Boodle, 2 Hurl. & Colt. 722; Scott *v.* London Dock Co., 3 id. 596; Fietal *v.* Middlesex R. R. Co., 109 Mass. 398; S. C., 12 Am. Rep. 720.) The defendant could not, by want of knowledge of the defective construction of the brake, escape the charge of negligence, when such want of knowledge was occasioned by mere omission to use the practical and accessible means of information of the defect. (Chapman *v.* Erie Railway Co., 55 N. Y. 579, 585; Brickner *v.* New York C. R. R. Co., 2 Lans. 506, 513; affirmed by Court of Appeals, 49 N. Y. 672; Hough *v.* Ry. Co. 100 U. S. [10 Otto] 213, 217, 219, 220, 221, 222; Laning *v* New York C. R. R. Co., 49 N. Y. 521, 532, 533; Russell Manuf. Co. *v.* N. H. Steamboat Co., 50 N. Y. 121, 126; Wyckoff *v.* Queens Co. Ferry Co., 52 id. 32, 36.) The plaintiff when he entered into the service assumed the ordinary risks and perils of the service incident to it and those only. (Gibson *v.* Erie Ry. Co., 63 N. Y. 449, 452; Hough *v.* Ry. Co., 100 U. S. 217; Gibson *v.* Pacific R. R. Co., 2 Am. Rep. [46 Mo.] 499, 450; Georgia R. R. & B. Co. *v.* Rhodes, 56 Ga. 645; Combs *v.* N. B. Cordage Co., 102 Mass. 572.) The plaintiff was not required to guard against perils and hazards in which the negligence of the defendant placed him. (Hough *v.* Ry. Co., 100 U. S. 217; Booth *v.* B. & A. R. R. Co., 73 N. Y. 40.)

George M. Diven, for respondent. The burden of proof in this case was upon plaintiff to show negligence in defendant. The presumption was to the contrary, and neither the breaking of the eyebolt, nor the fact that it was defective, will overcome that presumption. (Wood's Master and Servant, § 346; Sherman *v.* Western Transp. Co., 62 Barb. 150, 158.) If the car was properly constructed originally, as must be presumed, and afterward getting out of order was repaired, and this action was occasioned by the improper manner of such repair, this was the negligence of the fellow employee who made the repairs, and for this defendant is not liable, unless it was shown that there was negligence in the employment of the fellow servant who made the repairs. (Besel *v.* New York C. & H. R. R. R. Co., 70 N. Y. 171; Scoville *v.* E. R. R., 3 Weekly Dig. 114; Coon *v.* S. & W. R. R., 5 N. Y. 492; Wright *v.* N. Y. C. R. R., 25 id. 562; Wonder *v.* B. & O. R. R., 32 Md. 411; 3 Am. Rep. 143; Warner *v.* E. R. Co., 39 N. Y. 468; Chapman *v.* E. R. R. Co., 55 id. 579; Malone *v.* Hathaway, 64 id. 5.) Knowledge that any defect existed in the appliances used by the defendant, which caused the accident, was not shown to have been brought home to the defendant. (Warner *v.* E. R. Co., 39 N. Y. 468.) The risk was one assumed by plaintiff when he entered de-

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fendant's employ. (3 Am. Rep. 143 [32 Md. 411]; De Graff v. New York C. & H. R. R. R. Co., 3 T. & C. 255.)

RAPALLO, J.—The judge at the trial correctly stated to the jury the rule of law governing this case, instructing them that the defendant was required to exercise care and diligence in selecting and retaining in use fit and safe machinery, and implements fit for the use to which they were applied, and that if it failed to do so, and an accident consequently occurred by which an employee was injured, without negligence on his part, he might recover.

No exception was taken to the charge, but the defendant insists that there was no evidence bringing the case within the general rule stated, and a nonsuit should therefore have been granted.

The evidence fairly authorizes the inference that the injury to the plaintiff was caused by the breaking of an eye-bolt, by which the chain of the brake which plaintiff was operating was connected with the brake-rod; that this eye-bolt was defective, in not having been properly welded, in consequence of which defect it did not possess more than one third or one fourth of the strength which it would have had if properly made; and also that this weakness was not attributable to use or wear, but to insufficient care in its construction.

On this branch of the case the question is, whether sufficient was shown to authorize the submission to the jury of the question whether the defendant was chargeable with notice of the defect, or negligence in not discovering it, or in using the defective bolt. The employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, but he is not held to be a guarantor of their safety, and the onus is upon the plaintiff to show some negligence on the part of the employer in respect to the performance of the duty resting upon him as above stated. (DeGraff v. N. Y. Central & H. R. R. R. Co., 76 N. Y. 131.)

There was no evidence in this case of notice to the defendant or any of its agents to whom this duty was delegated, of the defect in the eye-bolt. Neither was it shown that the defect could have been discovered by inspection. On the contrary the testimony bore in the opposite direction, and it was shown that the defendant's cars were regularly inspected. There was evidence that the maker of the bolt could readily have discovered the defect by bending it while hot and in other ways, but there was no evidence whether it was made by the company or purchased ready made, nor can any want of care in not discovering the imperfect welding be suggested unless it be that some test should have been applied to the brake before putting the car in use, and whether or not this had been done the evidence does not disclose. The General Term held that the plaintiff had failed to make out his case so far as it rested upon the imperfect welding of the eye-bolt. Another defect, however,

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is charged by the counsel for the plaintiff which is of a different nature, and upon this the General Term does not appear to have passed. He claims that there is evidence that the eye-bolt was too small for the purpose to which it was applied. This, if established, would be a defect of which the defendant would be bound to take notice, and it would be for the jury to say whether it was sufficient to sustain the charge of negligence. The evidence on the point is not very convincing, and it can be argued with some force that, as it appears that if the bolt had been properly welded it would have been three or four times stronger than it was, its breaking is not attributable to want of size. Still, on the other hand, it may be said that if it had been of larger size, it would have been less liable to break even if partially defective. The question now is whether these matters were proper to be submitted to the jury. The testimony was that at the time of the trial the defendant used larger eye-bolts than the one which broke, though some of the witnesses testified that some of the small eye-bolts which were in use at the time of the accident still remained in use. One witness, an inspector of cars in the employ of the defendant, testified that at the time of the trial the defendant used the large eye-bolts in the brake rod, and that they did not break so much since it put them in, and that he thought it no longer used anything like the one in question (the one which broke). No one would seem to have been in a better position to know than this withness. It also appeared that the breaking of the chain had been of frequent occurrence. Many instances were proven, though it was not stated whether the break was in the links of the chain or in the eye-bolt, except as may be inferred from the testimony of the inspector before referred to. Several witnesses were called by the defendant, with the view doubtless of proving contributory negligence on the part of the plaintiff, who testified that they habitually took precautions against being injured by the breaking of the chain, and mentioned instances showing the necessity of such precautions. The eye-bolt which broke was submitted to the inspection of the jury, who could thus form some opinion of its sufficiency in point of size, and it also appears from the case that the larger eye-bolt adopted since the accident was produced at the trial.

Most of this evidence came from the witnesses on the part of the defendant, but if it supplied any defect in the plaintiff's testimony, he is entitled to the benefit of it in support of the denial of the nonsuit. The proof of negligence on the part of the defendant was slight, but we are unable to say that sufficient was not shown to justify the submission of the case to the jury.

The order of the General Term should be reversed, and the judgment on the verdict affirmed.

All concur except FOLGER, Ch. J., not voting.

Order reversed and judgment affirmed.

See note, p. 504.

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EDENS

v.

THE HANNIBAL AND ST. JOSEPH R. R. Co., Appellant.

(72 *Missouri Reports*, 212. *October Term*, 1880.)

Whatever is the real ground of complaint ought to be distinctly stated in the petition. Hence, in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. (Following Waldhier *v.* R. R. Co., 71 Mo. 514.)

The court disapproves the language in which the circuit judge urged the jury in this case to agree upon a verdict, as being manifestly prejudicial to the defendant.

APPEAL from Jackson Circuit Court, Hon. S. H. WOODSON, Judge.

Reversed.

After the jury had been out several hours, they came into court and announced that they were unable to agree. The judge then spoke to them of the time that had been consumed in the trial of the case, and discharged them until the next morning, telling them: "Gentlemen, come back to-morrow morning with a determination to compromise." When they came into the box next morning the court again spoke to them of the great importance to the parties and to the county that they agree upon a verdict, telling them orally, "that many things juries were authorized to compromise, such as amounts; that very seldom twelve men went into the jury room with the same notions as to amounts, and compromises were necessary," and directed them to retire and make a verdict. To this action of the court the defendant excepted.

George W. Easley, for appellant.

Belch & Silver, for respondent.

HOUGH, J.—The material portion of the petition in this case is as follows: "That on or about the 9th day of February, 1873, in the City of Kansas, Jackson County, Missouri, the defendant not regarding its duty, and by reason of its negligence and carelessness, plaintiff was run against by one of defendant's cars, thereby throwing plaintiff upon the rail of the defendant, the said car of defendant then and there ran upon and over plaintiff. That plaintiff was then and there, by reason of the carelessness and negligence of defendant as aforesaid, broken and mutilated as to his right leg, to such an extent as to require its immediate amputation in order to save the life of the plaintiff, thereby permanently dis-

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abling him, in all which he has sustained great loss and damage, as well in the permanent mutilation of his body as aforesaid, rendering him unable to work, and also in the great expense to which he has been subjected, and the great pain which he has suffered and still suffers, by reason of said negligence and carelessness of defendant." The natural and legal signification of the foregoing petition is, that the defendant was guilty of negligence in running the car or cars, which collided with plaintiff and ran over him. The court submitted to the jury the question of defendant's negligence in having a defective sand-box on the engine, and in keeping a defective frog in its track. If the real ground of complaint was that the machinery or track was defective it should have been distinctly stated in the petition. The plaintiff was not entitled to recover upon a cause of action not stated in his petition, and the court erred, therefore, in submitting to the jury issues which were not raised by the pleadings. Waldhier *v.* H. and St. Jo. R. R., 71 Mo. 514; Buffington *v.* A. and P. R. R., 64 Mo. 246.

That the motive which prompted the circuit judge to urge the jury to agree upon a verdict was a commendable one we do not doubt, but we cannot approve the language in which his desire was communicated to them. It was manifestly prejudicial to the defendant. The judgment will be reversed and the cause remanded.

All concur.

See note, p. 504.

NAYLOR

v.

CHICAGO AND NORTH-WESTERN RY. CO.

(*Advance Case. Wisconsin, December* 13, 1881.)

If a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for such injury merely on the ground that there was a safer mode for conducting the business, the adoption of which would have prevented the injury.

The undisputed evidence in this case showing that the plaintiff, before and at the time of receiving the injury complained of (from the falling of a bank of earth under which he was excavating gravel for defendant), was fully informed of the peril to himself of the services in which he was engaged, and voluntarily remained in the dangerous position which he was occupying, there was no error in rendering a judgment of nonsuit.

APPEAL from Circuit Court, Sauk County.

The plaintiff was in the service of the defendant company, working with many others in a gravel-pit a short distance from Baraboo.

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His business was to shovel gravel and earth upon cars which were backed into the pit. He was so employed about three months in the summer and fall of 1879. In October or November of that year, while so at work, a bank of earth under which he was excavating fell upon him and seriously injured him. This action was brought to recover damages for such injury. The alleged grounds of action are that the defendant was negligent in putting the plaintiff at work in a dangerous place without apprising him of the danger, and in not using reasonable and proper precautions to remove the danger. The gravel train upon which the plaintiff was shovelling earth was in charge of one Brown, who also superintended the work. Brown directed the plaintiff where to work, and he worked there two or three hours, and until the bank fell. At the time it fell an excavation two or three feet deep had been dug under it, partly by the plaintiff. Several of the men at work in the gravel-pit regarded the place where plaintiff was at work as dangerous, and left or avoided it. Twenty or thirty minutes before the bank fell Brown came along on the cars and said to the plaintiff and others: "Be careful, boys, it don't look safe." The plaintiff heard this caution, but did not change his position, or, so fear as appears, pay any attention to it.

The stratum of gravel from which the cars were being loaded was about five feet deep, and above that was a high bank of earth sloping from the pit. The ground was frozen a few inches in depth. The body of earth which fell was about the length of a car. It extended from the excavation upwards about ten feet, and was two or three feet thick. On the trial the court sustained objections to the following questions to witnesses propounded on behalf of the plaintiff: "How much labor would it have been to have gone up and pried that bank off? Was there anything in the character of that bank, or its surroundings, to prevent its being pried off? Is it or is it not the duty of the boss to keep the overhanging bank cut down so as not to be dangerous? What do you do when the bank is dug under so as to overhang? What do they do, in such cases, to protect the men?" Similar questions as to what course Brown's predecessor, one Nallett, pursued when the bank was in that condition were also ruled out on objection. At the close of the plaintiff's testimony the court ordered judgment of nonsuit, which was duly entered. The plaintiff appeals from the judgment.

Barker & Barlow and J. W. Lusk, for appellant.

W. F. Vilas, for respondent.

LYON, J.—Undoubtedly the general rule of law is that the implied contract between master and servant requires the master to provide suitable means, appliances and instrumentalities to enable the servant to do his work as safely as the necessary hazards of the employment will permit. It is well settled, however, that the mas-

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ter may conduct his business in his own way, although another method might be less hazardous; and the servant takes the risk of the more hazardous method as well if he knows the danger attending the business in the manner in which it is conducted. Hence, if a servant, knowing the hazard of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the master merely for such injury because he may be able to show that there was a safer mode in which the business might have been conducted, and that had it been conducted in that mode he would not have been injured. Many cases affirming these principles are cited in the brief of counsel for defendant. See also, Ladd *v.* R. R. Co., 119 Mass. 412; Clark *v.* R. R. Co. (Minn.), 2 Am. & Eng. R. Cas. 240, and cases cited.

Cases apparently within this rule sometimes arise, which, by reason of some special circumstance peculiar to the case, are taken out of it and are to be decided under the general rule first above stated; as, for example, the servant may know the machinery he is using is defective, but may not know that the defect exposes him to peril. Many of the cases cited by the learned counsel for the plaintiff belong to this class. It is believed that none of them assert a rule in conflict with that laid down in the cases above cited. Applied to this case, the law is that if the plaintiff, when at work in the gravel bank on the day he was injured, fully knew the hazards of the work,—if he knew that he was at work in a dangerous place, and that the bank of earth above was liable to fall upon him, —he cannot recover in this action. In that case it is quite immaterial that the work might have been made safe by detaching earth from the bank above him, or in any other manner. Having such knowledge his implied contract was that he would assume the hazards of the employment incident to the business as it was conducted. To quote the language of Devens, J., in Sullivan *v.* India Manuf'g Co., 113 Mass. 396: "When the servant assents to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no ground of complaint, even if reasonable precautions have been neglected."

Strohlendorf *v.* Rosenthal, 30 Wis. 674, will serve to illustrate this rule. In that case the plaintiff, the servant, was injured while working in the bottom of a deep shaft, which had been curbed to within twelve feet of the bottom. He was injured by the falling of a quantity of earth upon him from the side of the shaft below the curb. The defendant, the master, knew that there was a crack in the side

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of the shaft at the place from which the earth fell, which indicated that it was liable to fall, but sent the servant into the shaft without informing him of the danger. The servant was inexperienced in the business, and was not aware of the peril. The complaint alleged these facts, and also that the master was negligent in not properly securing and curbing the sides of the shaft. The master was held liable to respond in damages for the injury thus received by his servant, because the latter was not informed of the danger of the employment, and was not negligent. Had the servant been fully informed of such danger, it is clear that under the above rule he could not have recovered, even though he might have proved that the sides of the shaft were not properly secured, or that it was not curbed in a safe manner according to the usual custom, and that his injuries resulted therefrom.

It follows, from the rule above stated, that if the present plaintiff was fully informed of the peril of doing his work in the manner in which it was required to be done by the defendant's agent, Mr. Brown, it is immaterial that there was a customary, better, and safer way in which the work might have been done, which, had it been done in that way, would have relieved the plaintiff from peril and avoided the injury. This is all that need be said concerning the rulings of the learned circuit judge rejecting testimony offered on behalf of the plaintiff to show that the work might reasonably have been so conducted as to have avoided the injury, or that it was the custom so to carry on such work.

The question only remains, does the undisputed evidence clearly and satisfactorily prove that the plaintiff, before and at the time he was injured, was fully informed of the peril to himself of the service in which he was engaged? We think the question must be answered in the affirmative. The plaintiff is, presumably, a man of ordinary intelligence. He was cognizant of the practical effects of the law of gravitation, and knew that when a bank of earth is undermined by removing its foundation it is liable to fall. Such knowledge is not confined to experts. No one knew better than himself the extent to which the bank that fell upon him had been undermined, or could better judge of the peril. Many of his fellow-laborers in the gravel pit comprehended the peril, and left or avoided the place where the plaintiff was injured. Twenty or thirty minutes before the bank fell, Mr. Brown notified the plaintiff and others that the place looked dangerous, and cautioned them to be careful. The plaintiff was not required to remain there. Others had left the place because of the apparent danger, and he might have done so. Yet he continued his work there, constantly increasing the depth of the excavation, and with it the danger that the bank would fall, until it did fall upon him.

These facts are established by the undisputed evidence in the

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case, and it follows therefrom that the circuit court properly nonsuited the plaintiff.

Judgment affirmed.

See note, p. 504.

DELIE

v.

THE CHICAGO AND NORTH-WESTERN RY. CO.

(51 *Wisconsin Reports*, 400. *March* 2, 1881.)

In an action for injury to the person from the negligence of a railroad company, the complaint shows that an engine on which plaintiff was fireman was derailed and overturned, and that large quantities of steam and water escaped therefrom and fell upon him, and he was "severely burned, maimed and permanently injured, and has suffered and continues to suffer great pain in body and mind, and that by reason thereof he became, and for a long time remained, ill, and is still suffering from said injuries." There was no motion to make the complaint more definite and certain. *Held*, that there was no error in admitting evidence for plaintiff that the covering of his spinal cord was injured by the accident, and that urinal difficulties resulted from his injuries; nor in admitting evidence that an inguinal hernia made its appearance about nine months after the injury, and was the result thereof.

The fact that plaintiff failed to make adequate proof of the last averment, so that the court withdrew that subject from the consideration of the jury, has no bearing on the question of the admissibility of the evidence in the first instance.

A verdict for $1700 damages in this case not showing that the jury were actuated by passion or prejudice, this court refuses to set it aside as excessive.

APPEAL from the Circuit Court for Sauk County.

Defendant appealed from a judgment in favor of the plaintiff. The case is stated in the opinion.

For the appellant there was a brief by F. J. Lamb, and oral argument by Mr. Lamb and W. F. Vilas.

J. W. Lusk, for the respondent.

TAYLOR, J.—This action was brought by the respondent to recover damages for an alleged injury to his person, caused by the negligence of the appellant or its servants. The only errors assigned by the appellant are, that the allegations of the complaint were not sufficiently specific to authorize the admission of certain evidence tending to show that certain effects were the result of the injury complained of, and that the damages are excessive.

The complaint, after alleging that the plaintiff was a fireman upon one of the locomotive engines of the defendant, and charging that the defendant and its employees negligently and carelessly

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permitted a car loaded with iron to remain on the main track, by reason whereof the engine upon which he was employed ran into it and was thrown from the track, states the injury to the plaintiff as follows: "And the said engine was thrown from the track, tipped over, and large quantities of steam and water escaped therefrom and fell upon the plaintiff, and the said plaintiff was severely burned, maimed and permanently injured, and has suffered and has continued to suffer great pain in body and mind; that, by reason thereof, the plaintiff became and for a long time remained ill, and is still suffering from said injuries so received as aforesaid."

Upon the trial, the plaintiff was permitted to show under objection, that the covering of the spinal cord was injured by the accident, and that urinal difficulty resulted from his injuries, and to give evidence that an inguinal hernia made its appearance about nine months after the injury, and other evidence tending to show that such hernia was the result thereof. It is insisted by the learned counsel for the appellant, that no evidence of these alleged results of the injury should have been received under the general allegations of the complaint; that, in order to permit the plaintiff to give evidence of such results, he should have set them out particularly in his complaint. It is not very strenuously denied by the learned counsel that, under the general allegations of injury set out in the complaint, the plaintiff might properly be permitted to show such injuries to his person as were immediately apparent, and that, consequently, the injury to the spinal cord and the urinal difficulties might be proved; but they very earnestly insist that the evidence of the appearance of the hernia nine months after the accident, and the attempt to show that it was caused thereby, should have been excluded, on the ground that this effect was too remote, and not the natural, ordinary or necessary result of the original injury, and not such an effect as the defendant could anticipate would or might result therefrom, and it could not, therefore, come to the trial prepared to meet the evidence of the plaintiff upon that question.

It is not claimed on the part of the appellant that the complaint does not state a cause of action. If the allegations of injury are sufficient to entitle the plaintiff to recover anything more than nominal damages, then it seems to us very clear that he is entitled to recover such damages as he actually sustained by reason of all the injuries to his person resulting from the accident, and that, in order to enable the jury to estimate his damages, he must be permitted to show what those injuries in fact were. We think that, in cases of this kind, if the defendant does not desire to have the plaintiff make his allegations as to the nature of his injuries more definite and certain, and does not ask to have it done by a proper motion for that purpose, he must come prepared to meet any proof which the plaintiff may offer which shows or tends to show the

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real nature of the injuries which were the direct result of the accident. This, we think, was the rule held, even under the old practice, by this court in Birchard *v.* Booth, 4 Wis. 74. In that case the court held that, under allegations as general as in this case, the plaintiff might show that as one of the results of the battery his shoulder-blade was broken. The present chief justice, in his opinion in that case, says: "It was contended on the argument that the fracture of the shoulder-blade should have been specially and circumstantially set forth in order to apprise the defendant of the fact to be proved; and that it was a surprise upon him to admit proof of it under the general language of wounding, beating, bruising, etc.; and, although we think such a special statement of the injury might have been very proper, yet we cannot say that it was essentially necessary. As already stated, we can but view that injury as the natural and necessary result or consequence of the battery. That wrongful act was the efficient producing cause of the fracture and loss of health, and we think it is sufficient to allege it in this general manner." See also Schmidt *v.* Pfeil, 24 Wis. 452, 455.

If, under the old rules of pleading, under general allegations of wounding, bruising and beating, the plaintiff could be permitted to show all the injuries to the person which resulted from the battery, there is much greater reason for allowing such evidence under the code practice, which gives the defendant the clear right to have the general allegations made more specific and certain if he desires it. This court has lately decided, in Redmon *v.* Ins. Co., ante, p. 292, that general words in an answer, in an action upon an insurance policy, charging a breach of warranty on the part of the insured in not having answered truthfully in regard to the amount of incumbrances upon the property insured, stating that there were other incumbrances, and the amount thereof, were sufficient to permit proof of other incumbrances than those stated by the insured. The decision was placed upon the ground that the facts stated showed a breach of the warranty, and if the plaintiff desired a more specific statement of them he should have made his motion. Having failed to make such motion, the defendant should be permitted to prove on the trial the existence of any incumbrance which would show a breach of the warranty. Kimball *v.* Darling, 32 Wis. 675, 684; Schmidt *v.* Pfeil, 24 Wis. 452, 455; Hewit *v.* Mason, 24 How. Pr. 366; People *v.* Ryder, 12 N. Y. 442. So in the case at bar, the defendants not having called for any more specific statement of the plaintiff's injuries than those set out in his complaint in general terms, the plaintiff must be permitted to prove on the trial all such personal injuries as in fact resulted from the accident. This disposes of all the objections to the evidence showing what were the immediate effects of the accident.

But the counsel for the appellant urges that, as the hernia did

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not make its appearance until nine months after the accident, it cannot be said that it was the result of the accident, and certainly not the direct and immediate result thereof, and therefore evidence concerning it should not have been admitted under the allegations of the complaint. If the hernia had appeared immediately after the accident, under the rule above stated, there would be no doubt as to the right of the plaintiff to prove the fact as one of the results of the injury; and we think the mere fact that it did not become apparent to the plaintiff until some length of time after, can make no difference as to the right of the plaintiff to show that it was in fact caused by the accident.

In Schmidt *v.* Pfeil, 24 Wis. 452, the former chief justice, Dixon, says: "The question put to the plaintiff as to his having felt any lameness or effects from the injuries after the expiration of the first seven weeks after the battery, was legitimate and proper. The evidence was not inadmissible on the ground that the damage was too remote, or of the special or peculiar kind which must be specifically set forth in the complaint by way of aggravation, in order that the defendant may have due notice of the claim. It was not evidence of that kind of damage which the law would imply was not the natural and necessary consequence of the assault and battery. It was evidence of damage which might naturally and necessarily result from the acts complained of; and it was for the jury, upon the whole evidence, to say whether it did result or was the obviously probable result of the beating; and hence the evidence was admissible under the general allegation."

In this case there was no allegation of any permanent injury to the plaintiff. In the case at bar, the plaintiff offered the evidence of the fact with a view of proving that it was caused by the accident. He would be compelled to prove its existence before he could be permitted to show that the accident was the cause. That he attempted to do by the evidence on his part. The fact that he failed in showing that it was caused by the accident, does not render the evidence tending to prove that fact inadmissible. The admissibility or inadmissibility of evidence tending to prove a fact which is within the issues, does not depend upon the success of the party offering it in establishing the fact sought to be proved. If the evidence offered is pertinent to prove the fact, then it is admissible. If such party fails in his proofs, it is, perhaps, the duty of the judge to say to the jury, as the learned judge did in this case, that he has failed to prove that fact, and therefore they are not to consider it in making up their verdict. If the plaintiff could have shown by the evidence that the hernia was the direct result of the accident, we think he was entitled to have his proofs admitted under the general allegations in his complaint; and, as the judge could not determine beforehand whether he would succeed in establishing that fact, he was right in overruling the objection to the

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evidence and hearing what was offered. After hearing all that was offered on both sides upon that point, the judge was of the opinion that the plaintiff had failed to connect that injury with the accident, and so told the jury. This was all he was called upon to do, in the absence of any request on the part of the defendant to give any more specific directions upon that point. The record does not present the case of an erroneous decision of the court, under which improper evidence was received, and an attempt to cure the same by withdrawing such evidence from the consideration of the jury. It only presents the case of an attempt to prove a fact, within the issues, which would enhance the plaintiff's damages, by the introduction of evidence tending to prove it, and therefore admissible, but which fact, upon all the evidence introduced by both parties, it was clear the plaintiff had failed to establish. In such case the court was not bound to withdraw the evidence in form from the consideration of the jury, but, as was done substantially in this case, to instruct the jury that the evidence failed to establish the fact.

We are asked by the learned counsel for the appellant to set aside the verdict and grant a new trial because the damages assessed are excessive. If the plaintiff was in fact injured to the extent the evidence tended to show, and has suffered from such injury and is likely to suffer for the length of time the medical witnesses are of opinion he will, we cannot say the damages found by the jury are excessive. We cannot say that $1700 is an excessive compensation for the physical and mental suffering which this young man has endured and must endure during a sickness of four years. There are no fixed rules for measuring damages which may be allowed for physical and mental suffering. Damage of this kind is a matter of the greatest uncertainty, and must from the necessity of the case be left to the discretion of the jury; and that discretion cannot be interfered with by the courts, unless the award is so disproportioned to the suffering sustained that it is clear the jury were actuated by passion or prejudice, and not by a desire to give a just and fair compensation. There is nothing in the amount awarded in this case to satisfy us that the jury were actuated by any other motive than a desire to do what was just between the parties.

We think the case was fairly tried and fairly submitted to the jury, and that no errors were committed which prejudiced the appellant.

By the Court.—The judgment of the circuit court is affirmed.

See note, p. 504.

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KELLEY, Adm'r, etc.,

v.

CHICAGO, M. AND ST. P. R. CO.

(53 *Wisconsin Reports*, 74. *September* 27, 1881.)

The mere fact that in a railroad company's private yard, where cars are loaded and unloaded, and trains made up, such cars are permitted to move along the tracks unattended by a brakeman, cannot be held negligence as matter of law as against the company's servants employed in such yard.

One who undertakes an employment with full knowledge of the rules and methods pursued by the employer in the business cannot recover from the employer for an injury happening in consequence of such methods.

In an action for injuries from negligence, where the specific acts constituting such negligence are averred in the complaint, it must be presumed here, in the absence of anything in the record to the contrary, that the evidence of negligence was confined to those acts, even where there is a general verdict for the plaintiff.

Quære whether, when a special verdict is demanded by either party, it is proper, under our statute, to take also a general verdict.

Where a special verdict was demanded and ordered, it will not be presumed here that the jury were also directed to find a general verdict.

After answering all the questions propounded for a special verdict, the jury added that they found "for the plaintiff to the amount of $2000." In the absence of any proof in the record that the court directed a general verdict, this is construed as simply a finding of plaintiff's damages in case he was entitled to recover upon the facts of the special verdict.

APPEAL from County Court, Milwaukee County.

Murphy & Goodwin and J. M. Connolly, for appellant.

D. S. Wegg and J. W. & M. B. Cary, for respondent.

TAYLOR, J.—This action is brought by the administrator of John Larkin, deceased, to recover damages of the defendant for negligently causing the death of said deceased. The record shows that at the time of receiving the injury which caused the death of the deceased he was, and for some time previous thereto had been, in the employ of the railway company. The complaint charges the injury to have happened to the deceased—First, by reason of the carelessness of the railway company; second, through the carelessness and negligence of its agents and servants. In the complaint, the plaintiff sets out the facts relating to the employment and duties of the deceased, and the alleged negligence and carelessness of the defendant, and its agents and servants, as follows:

"That on and before the twenty-sixth day of August, A.D. 1879, the said John Larkin had been and was hired by the said defendant, and employed by it in and about the business of coupling and switching, and taking care of the cars of said defendant in the

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yard of said defendant in the city of Milwaukee, said county; that in the performance of his duties as such servant said Larkin was required to be at and near the tracks of said company in its said yard, and near elevator A, situate in the yard of said defendant; and the said Larkin was then and there charged with the duty of switching and coupling cars, and preventing injury to the property of said company, by collision or otherwise, in the moving of said cars on the various tracks in the yard of said defendant.

"Plaintiff further alleges that on or about said twenty-sixth day of August, A. D. 1879, the said defendant wrongfully, negligently, and in a grossly careless manner, allowed a freight car to run loose upon one of its tracks in said yard, on a down grade thereof, without any person being stationed thereon to set the brakes thereon, or to signal an alarm at its approach, and without any provision made for arresting the progress of said car when once in motion—the said defendant then and there well knowing that to allow a car so to run loose was grossly careless and negligent; and this plaintiff alleges that the said John Larkin, seeing such car advancing, and the same being then and there in imminent danger of colliding with a switch-engine then and there being upon the same track, turned a switch and thus prevented a collision by turning this car onto another track.

"And this plaintiff further alleges that at or about the same time the said defendant wrongfully, carelessly, and negligently allowed a certain other freight car to run loose out of said elevator A, and concealed from said Larkin, upon a track which crossed the track upon which said first-mentioned car had been switched, without any person being stationed thereon to set the brakes or to signal an alarm at its approach, and without any provision made for arresting the progress of the same when once in motion; the said defendant then and there well knowing that to allow a car so to run loose was grossly careless and negligent."

The answer is a general denial, and an allegation that the injury which caused the death of the deceased happened by reason of the negligence of the deceased.

There was a jury trial and a special verdict. After verdict, both parties moved for judgment upon the verdict, and the court below ordered judgment in favor of the defendant, dismissing the plaintiff's complaint with costs, and denied the motion of the plaintiff for judgment in his favor. There was no bill of exceptions settled in the case, and this appeal brings up only the pleadings, verdict, motion for judgment, and judgment.

Larkin, the deceased, was injured and died while section 1816, Rev. St. 1875, was in force, which made the company liable to its employees for injuries occurring through the negligence of its other agents or servants.

Without setting out at length the 30 questions submitted to

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the jury for them to answer as their special verdict, it is sufficient for the purposes of this case to state that the jury have not found by their special verdict that the defendant company, or any of its agents or servants, were guilty of any carelessness or negligence which caused the injury resulting in the death of the deceased. No interrogatory was submitted to them upon that subject. This defect in the verdict must be fatal to the right of the plaintiff to a judgment in his favor, unless it be cured, either by what is claimed to be a general verdict in his favor, or the finding that the cars which collided and caused the injury were permitted to run on the track out of the elevator, and on the track alongside of the same, without a brakeman thereon, is a sufficient finding of fact from which the court can infer negligence as a conclusion of law.

It is urged by the learned counsel for the appellant that there is a general verdict in this case for the plaintiff, and that such general verdict must be construed to have found in favor of the plaintiff upon all questions of fact not covered by the special findings of fact, necessary to sustain the general verdict, and it must be held, therefore, that the jury have found that the defendant was guilty of negligence which caused the injury. We have very grave doubts whether it is proper practice under our statute, when a special verdict is demanded by either party, to take a general verdict upon the whole case. Such a practice, it seems to me, would complicate the case so that it would be difficult to determine what issues were submitted to the jury for their special determination, and what were reserved to be covered by the general verdict. But, whatever may be the correct rule in respect to this question, we are of the opinion that in this case there was no general verdict rendered by the jury upon the whole case. That part of the verdict relied upon by the learned counsel for the appellant as a general verdict upon the whole case in favor of the plaintiff, it seems to us, is simply an assessment of damages in his favor, supposing the plaintiff to be entitled to recover upon the facts found by the special verdict. The record shows that after the jury had answered all the questions propounded as a special verdict they added thereto the following: "We, the jurors in the above-entitled action, find for the plaintiff to the amount of $2000."

As the record shows that a special verdict was demanded by the defendant on the trial, and that a special verdict was found by the jury, we must construe this finding as simply a finding of the damages sustained by the plaintiff in case he is entitled to recover in the action upon the special facts found and not as a general verdict in his favor upon the whole case. A special verdict having been demanded and ordered, we are not to presume that the court directed the jury to find a general verdict upon the whole case. We do not think the difficulty in the special verdict is helped out by what is called the general verdict by the counsel for the

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appellant. Can the court find, as a conclusion of law, that the defendant, its agents, or servants, were guilty of negligence, and that such negligence caused the injury to the deceased, from the fact found that the two cars which collided and caused the injury were permitted to run upon the track in the defendant's yard without any brakeman on the same to control them? We think this question must be answered in the negative. Independent of any regulations made by the company for conducting their business in their yards, where cars are loaded and unloaded and made up into trains, we do not think the circuit court would be justified in holding, as a question of law, that it was the duty of the company to see that every car moved along its tracks, in its yards, should have some one in charge of the same whenever it was moved.

A court would probably be justified in declaring, as a matter of law, that it was negligence in a railroad company to permit its cars, or even a single car, to move along its track in a public place, such as a street crossing, or, perhaps, at its passenger depots, where the public are permitted to be upon and travel across its tracks, without having some one on the same to control its movements; but the question presented by this case is an entirely different question. The cars which were permitted to go along its tracks unattended were in the private yards of the defendant, where no persons were expected to be present except its servants and agents, many of whom were present solely for the purpose of moving the cars on the tracks without being upon the same as brakeman. If it was negligence to permit the cars to run unattended in the defendant's yard, where cars are loaded and unloaded and moved about for the purpose of making up trains, such negligence is not so apparent that a court may pronounce upon it as a matter of law. At most, it might be a fact to go to the jury upon the question of negligence. See C. and N. W. Ry. Co. *v.* Donahue, 75 Ill. 106. But the facts found by the special verdict show, beyond a doubt, that the deceased had no cause of complaint against the defendant because it permitted its cars to run unattended by a brakeman in said yard where he was employed. It appears, from the special verdict, that the deceased had often discharged the duties of car-coupler behind the elevator previous to the time when the accident happened, and that he was discharging such duties at that time; that he understood the custom of the yard as to handling cars behind the elevator; and that the cars which did the injury were moved at the time in the ordinary and usual way in which the business had been done at that point for the past fifteen years.

These facts being found, it is clear that the deceased knew that it was the custom in that yard to permit the cars to run out of the elevator, and on the track outside thereof, without any brakeman on them, and also that it was a part of his duty at the time to take such cars as they came down upon these tracks and place them in

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certain positions, as ordered at the time. If it was the habitual custom of the company to permit the cars to run upon said tracks without a brakeman, and such custom was known to the defendant before the accident, then the danger to himself arising out of such custom was one of the risks of his employment, and he could not recover of the company for an injury to himself resulting therefrom. It is well-settled law that any employee who undertakes an employment with full knowledge of the rules, regulations, and methods of doing such business, cannot recover from his employer for an injury happening to him, and which results from such rules or methods. This court say, in the case of Strahlendorf *v.* Rosenthal, 30 Wis. 674–678, "that the plaintiff, when he contracted to work for the defendant in and about the sinking of the shaft, took upon himself the necessary and usual risks of the employment." In Flannagen *v.* C. and N. W. Ry. Co., 50 Wis. 462–472; Same *v.* Same, 45 Wis. 98, this court again say: "The plaintiff was well acquainted with the hazards of this business of handling cars in and about the yard in which he was engaged, . . . and he voluntarily assumed the risks attendant upon such employment." This doctrine is more fully discussed and affirmed in the following cases: C. and N. W. Ry. Co. *v.* Donahue, 75 Ill. 106; R. R. Co. *v.* Barber, 5 Ohio St. 541; Wright *v.* R. R. Co., 25 N. Y. 562; Baxter *v.* Roberts, 44 Cal. 187. These cases, and many more which might be cited, clearly show that if deceased knew the manner of doing business in the defendant's yard, and remained in its employment after such knowledge, or entered such employment with such knowledge, then he could not recover for any injury to him resulting from such management, and consequently his administrator cannot recover in this action.

The special facts found show that the business had been conducted in said yard for many years previously as it was at the time of the accident, and that the deceased had full knowledge thereof, consequently neither he nor his administrator is in a position to complain on account of any injury to his person resulting from such method of doing its business.

If the learned counsel for the appellant was right in his position that there is a general verdict in this case which must be construed to cover all the issues, and that the jury must have found that the defendant was guilty of negligence which caused the injury, still we think that such finding would be inconsistent with the special finding of fact that the business was done in the same manner at the time of the accident as it had been done for fifteen years previous, and that the defendant had frequently performed the same duties that he was performing when the accident occurred, and must, therefore, have had knowledge thereof. The complaint alleges no act of negligence on the part of the defendant except that it, and its servants and agents, permitted the cars to run out of the elevator, and on the track beside the elevator, without any

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brakeman or other person to control them; and in the absence of any bill of exceptions, showing any other alleged negligence on the part of the defendant, it must be presumed that the plaintiff's proofs were confined to the allegations in the complaint, and that the jury, if they have found the defendant guilty of any negligence, must have based such finding upon that fact, and that alone. But, as we have said above, that fact, explained as it is by the special findings, is no ground for charging the defendant with negligence. A general verdict, finding negligence on the part of the defendant, for that reason could not stand, being inconsistent with the special findings. Lemke *v.* C., M. and St. P. Ry. Co., 39 Wis. 449.

In this view of the case it is unnecessary to discuss the question as to the contributory negligence of the deceased, upon which the special findings of the verdict are somewhat in conflict. We think the judgment of the circuit court should be affirmed upon two grounds—First, that the verdict does not find that the defendant's negligence caused the injury to the defendant, nor any facts from which such negligence can be affirmed as a question of law; second, that the special findings show that the injury of the deceased, so far as it was the result of any act of the defendants, its agents or servants, was the result of the manner of doing the business in the defendant's yards, of which the deceased had full knowledge long before the accident occurred, and was therefore one of the risks of his employment, for which he could have no action against the defendant, and consequently his administrator could have none.

The judgment of the circuit court is affirmed.

See Kelley *v.* Chicago, etc., R. R. Co., 2 Am. & Eng. R. R. Cas. 65.

See note, p. 504.

The Lake Shore and Michigan Southern Ry. Co.

v.

McCormick.

(74 *Indiana Reports*, 440. *May Term*, 1881.)

Where the special finding of the facts is inconsistent with the general verdict, the former will control the latter, and the court must give judgment accordingly.

An employee, when he enters the service of an employer, impliedly agrees to assume all risks ordinarily and naturally incident to the particular service; and the employer impliedly agrees that he will not subject the employee, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to the particular service in which the employee is to be engaged.

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The employer's obligation is not to supply the employee with absolutely safe machinery, or with any particular kind of machinery, but to use ordinary and reasonable care not to subject the employee to extraordinary or unreasonable danger.

When a master employs a servant to do a particular kind of work with particular kind of instruments and machinery, the master does not agree that they are free from danger in their use, but that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant in the use of such machinery, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service.

Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but, if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for injuries which may occur to them in the use of such implements or machinery. The St. Louis, etc., Ry. Co. *v.* Valirius, 56 Ind. 511; criticised.

In an action against a railroad company by a brakeman for an injury received while engaged in coupling cars, by his foot being caught in a dangerously constructed frog at a switch on the line of the road, the jury found specially that the switches and frogs of the road were in the same condition during all the time the plaintiff was in the employ of the defendant, and that they were of the same kind as those used on the principal railroads in the country; that plaintiff had full opportunity to acquire a knowledge of the condition of all the switches and frogs in the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that while walking on the track behind a moving car, his foot was caught in one of the frogs; that the printed rules of the company forbid brakemen to go between the cars in motion to couple them, and forbid coupling by hand in all cases where a stick could be used; that, in consideration of employment by defendant, the plaintiff agreed to obey said rules; that, under the circumstances, the plaintiff used proper care to avoid injury to himself.

Held, that the defendant was not liable.

From the Laporte Circuit Court.

J. B. Niles and J. I. Best, for appellant.

S. L. Trippe, for appellee.

Scott, J. — McCormick sued the Lake Shore and Michigan Southern Ry. Co. for damages resulting from an injury received by him at South Bend, on the 4th day of October, 1876, while engaged as a brakeman on the appellant's railroad. He alleged in his complaint that, while engaged in coupling cars, he was, without fault on his part, caught in a dangerously constructed frog, which, without proper safeguards and necessary protection, was negligently allowed to remain in the track of the company's road at South Bend; that the appellant had carelessly and negli-

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gently constructed and suffered said frog to be and remain wholly without any mechanical contrivances, wooden block protections and safeguards, which could and would have rendered the same safe. The appellee further alleged that he was wholly ignorant of the condition and situation of the road at the point where he was hurt, and that he had no knowledge of such switch and frog and their unprotected condition and the absence of safeguards at that point, and had no means or opportunity of acquiring any knowledge in relation thereto. Issue was formed, and a trial by jury resulted in a general verdict for the appellee in the sum of $5000. The jury also returned answers to special interrogatories. The interrogatories and the answers thereto are as follows:

"1st. Were the frogs and switches on the defendant's road between Elkhart and Chicago, and at Chicago, substantially of the same character and in the same condition continuously from the 8th day of April, 1875, to the 4th day of October, 1876? Ans. Yes.

"2d. Had the frog at South Bend, in which the plaintiff's foot was caught, at the time of the alleged injury to him complained of in this case, been during all that time in substantially the same condition as when the injury occurred? Ans. Yes.

"3d. Was not that frog, and were not all the frogs and switches on said part of the defendant's road, open to view and plain to be seen by any persons inclined to look at them during all that time? Ans. Yes.

"4th. Could any person, during all that time, looking carefully at the frogs and switches in said part of said road, including those at South Bend, plainly see and acquire full knowledge of their condition? Ans. He could, as to outward appearances.

"5th. Is it not dangerous for a person to walk on the track, among such frogs and switches, behind a moving car, without taking any notice of the frogs or switches over which he is passing? Ans. No.

"6th. Was it consistent with ordinary care and prudence, for a man to walk in front of a moving car over a frog such as that in which the plaintiff's foot was caught, without looking at or taking any notice of the frog or track over which he was walking? Ans. No.

"7th. Was the plaintiff walking on the track, behind a moving car, when the injury complained of occurred? Ans. Yes.

"8th. Could the plaintiff, between the 8th day of April, 1875, and the 4th day of October, 1876 (passing, as he did, back and forth over the road), by the careful use of his eyesight, have ascertained the character and condition of said frogs and switches, had he tried to do it? Ans. No.

"9th. Had the plaintiff the means, during said period of time, of becoming acquainted with the fact that there were such frogs

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and switches at the station at South Bend, and at or near the point where he was injured in coupling cars, when the accident complained of occurred, and could he have informed himself of that fact by the careful use of his faculties? Ans. Yes.

"10th. Did not the company, during the time when the plaintiff was in its employ, have printed rules, which forbid brakemen to get between cars in motion to couple them, and all similar imprudences, which forbid coupling by hand in all cases when a stick could be used to guide the link or shackle, and enjoin upon them in all cases to take time to do their duty in safety? Ans. Yes.

"10½. Did not the plaintiff, at the time of his employment by the defendant in April, 1875, in consideration of such employment, agree with the defendant that he would obey said rules? Ans. Yes.

"11th. Did the plaintiff, during the time he was in the employ of the defendant, make any effort or use any care to ascertain the condition of the frogs and switches on the part of the defendant's road over which his employment extended, or of those at South Bend? Ans. No.

"12th. Were the frogs and switches on the defendant's road, at the time of the accident to the plaintiff, substantially of the same form and in similar condition as those generally used on the principal railroads of the United States? Ans. Yes.

"13th. Did the plaintiff, in making the coupling when the accident complained of occurred, use proper care to avoid injury to himself? Ans. Yes, under the circumstances."

The appellant moved the court for a judgment in its favor on these special findings, which motion was by the court overruled, and to this ruling the appellant excepted. A motion for a new trial was made, and overruled by the court, and the appellant excepted to this ruling of the court. The correctness or incorrectness of these rulings is presented for the consideration and opinion of this court by the assignment of errors.

It is the settled law of this State, that when the special finding of the facts is inconsistent with the general verdict, the former shall control the letter, and the court shall give judgment accordingly. The Grand Rapids, etc., R. R. Co. *v.* Boyd, 65 Ind. 526, and authorities there cited.

A judicial judgment is formed like any other judgment of the human mind, and is simply a conclusion from certain premises. The law being the first or major premise, the facts being the second or minor premise; the conclusion from these premises constitutes every legal or judicial judgment.

We regard the following propositions as sound in principle, and sustained by the weight of authority:

The servant, when he enters into the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service; and the master or

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employer impliedly agrees that he will not subject his servant, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to the particular service in which the servant is to be engaged.

The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger.

When a master employs a servant to do a particular kind of work, with particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery, to be used by such servant, are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service.

In the case of The St. Louis, etc., Ry. Co. *v.* Valirius, 56 Ind. 511, this court sanctioned the following instruction: "It is negligence to use cars dangerous in their construction, when there are others to be secured which are not dangerous; and railroad companies are bound to procure the best, otherwise they must be held responsible." The latter sentence of this instruction, if taken literally and in its broadest sense and unconnected with the former sentence, we think would go too far. Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for any injury which may occur to them in the use of such implements or machinery. Walsh *v.* The Peet Valve Co., 110 Mass. 23; Cayzer *v.* Taylor, 10 Gray, 274; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; The Schooner "Norway" *v.* Jensen, 52 Ill. 373; Hayden *v.* Smithville Manufacturing Co., 29 Conn. 548; Morris *v.* Gleason, 1 Bradwell, 510; The Indianapolis, etc., R. R. Co. *v.* Love, 10 Ind. 554; The Ohio, etc., R. R. Co. *v.* Hammersley, 28 Ind. 371; McGatrick *v.* Wason, 4 Ohio St. 566; Sullivan's Adm'r *v.* Louisville Bridge Co., 9 Bush, 81–89; Nolan *v.* Shickle, 3 Mo. App. 300; Cummings *v.* Collins, 61 Mo.

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520; International, etc., R. R. Co. *v.* Doyle, 49 Tex. 190; Houston, etc., Ry. Co. *v.* Oram, 49 Tex. 341; Ogden *v.* Rummens, 3 Fost. & F. 751; Williams *v.* Clough, 3 H. & N. 258; Seymour *v.* Maddox, 16 Q. B. 326; Priestley *v.* Fowler, 3 M. & W. 1; Perry *v.* Marsh, 25 Ala. 659; Ormond *v.* Holland, Ellis, B. & E. 102; Gibson *v.* Erie Ry. Co., 63 N. Y. 449; Wonder *v.* Baltimore, etc., R. R. Co., 32 Md. 411; Summersell *v.* Fish, 117 Mass. 312; Tinney *v.* The Boston, etc., R. R. Co., 62 Barb. 218, and 52 N. Y. 632; Columbus, etc., Ry. Co. *v.* Arnold, 31 Ind. 174; Malone *v.* Western Transportation Co., 5 Biss. 315; Kielley *v.* Belcher, etc., Mining Co., 3 Sawyer, 437; Warner *v.* The Erie Ry. Co., 39 N. Y. 468, and 49 Barb. 558; Wharton Law of Negligence, secs. 213 and 244, and the authorities there cited.

The following are the facts found specially by the jury as embodied in the foregoing interrogatories, and the answers thereto:

The appellant owned a railroad; the appellee was employed as a brakeman on the road; that on the road there were certain switches and frogs; that these switches and frogs were in the same condition during all the time the appellee was in the employ of appellant; that these switches and frogs were of the same kind as those used on the principal railroads in the United States; that these frogs were plain to be seen by any person inclined to look at them; that the appellee had full opportunity to acquire a knowledge of the condition of all the switches and frogs in the appellant's road, including the one at South Bend; that the appellee, during the time he was in the employ of the appellant, made no effort, nor did he use any care, to ascertain the condition of the frogs and switches at the place where the injury to him occurred; that the appellee was walking on the track of the railroad behind a moving car, when his foot was caught in one of these frogs, and was injured while coupling cars; that the company had printed rules, while the appellee was in its employ, which forbid brakemen to get between cars in motion to couple them; which forbid coupling by hand in all cases, when a stick could be used to guide the link; and said rules enjoined upon them, in all cases, to take time to do their duty in safety; that the appellee, in consideration of his employment by the appellant, agreed to obey said rules; that appellee, under the circumstances, used proper care to avoid injury to himself.

From the law as we have stated it in the foregoing propositions, and from the special finding of facts by the jury, as herein set out, we are forced to the conclusion, as a logical and legal sequence, that the appellant was not guilty of such negligence as made it liable to the appellee for the injury so received by him; but that the injury to the appellee was the result, rather, of an accident, the risk of which the appellee must be deemed to have taken upon himself when he entered into the service of the appellant.

The special finding of facts, in our opinion, is inconsistent with

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the general verdict, and in view of the well settled law, above referred to, the motion of the appellant for judgment in its favor on the special finding should have been sustained.

The judgment is reversed, and cause remanded with instructions to the circuit court to sustain the appellant's motion for a judgment on the special finding, and to enter judgment accordingly.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

See note, p. 504.

BALLOU, Adm'x,

v.

CHICAGO AND NORTH-WESTERN RY. CO.

(Advance Case, Wisconsin. February 7, 1882.)

In an action against a railway company (under section 1816, Rev. St.) for injuries to an employee, where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the person injured had been frequently in charge of the same car, and in the habit of using the same ladder, there was no error in directing a nonsuit.

One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact.

APPEAL from Circuit Court, Winnebago County.

At the time of his death the intestate was an employee as brakeman on a regular freight train of the defendant, being run and operated between Oshkosh and Fort Howard, under the conductorship of the witness Mr. Sykes, and had been in such employ for three years. On the day previous to his death, freight car No. 57, in question, belonging to the Green Bay and Minnesota R. R. Co., was taken by the train upon which deceased was employed from that company at Fort Howard Junction, loaded with charcoal, and drawn to Fort Howard, from where it was taken in the train on the return trip to Depere, at which place it was consigned, and hence was there left. On the return of this train from Oshkosh the next day it stopped at Depere, and, leaving the most of the train on the main track, the engine No. 29 and tender passed onto the side track or switch, and the deceased hitched this car No. 57 onto the front of the engine, and then the engine backed out

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onto the main track and started to get another car, going up to near Bolles' side track with No. 57 attached, and the deceased riding upon the top of it, when it stopped, and the deceased climbed down the ladder in question at the north end of this No. 57 (being the end in the direction in which it was going), and, turning the switch, gave the ordinary signal with his hand to the engineer to go ahead, and said "Go ahead, Fred!" which he did; and then while the engine, together with this car No. 57, was moving at the rate of two or three miles an hour, the deceased, being upon the ground, grabbed one of the rounds of this same ladder with his left hand, and then grabbed and reached another round with his right hand, and giving a spring struck the bumper with his left foot, when one of the slats or rounds of the ladder, about seven feet from the ground, which he had hold of, gave away, and he fell right backward onto the track, and this car No. 57 ran over him and killed him instantly. The distance from where the car stood when the signal was given, and the place where it was going to get the other car, was some eight or ten rods, and the surface of the ground in the space between was level, except the tracks, and there was no difficulty in walking over it. The slat or round which gave away was about three feet long, two inches wide, and one inch and a quarter thick at one end, and one inch and three eighths at the other end, and made of oak timber.

The ladder consisted of four slats or rounds of this size, fastened at each end with screw bolts, onto oak stanchions standing upright near the middle of the end of the car, and forming a part of the end of the car, as timbers or studding, the lower end being in stake holes, as it had previously been a flat car. The bolts were three eighths of an inch or seven sixteenths of an inch thick; and the one that came out only passed into the stanchion about one half of an inch of the threads, whereas it should have passed in to the extent of one and a half or two inches. The bolt did not break, but pulled out of the stanchion, with the threads of the screw filled with the wood. A small portion of stanchion, at the place where the screw went in, was decayed, and another hole indicated that a screw had previously broken off. This decay near the screw and the hole were concealed from observation by the slat or round while the same was in place and before it gave away. The same train, with the same brakeman, had been in the habit of handling the same car, No. 57, once or twice a week during the year previous. The accident occurred between 3 and 4 o'clock in the afternoon of a nice, bright day. The brake on this car, No. 57, was at the top of the car, near the ladder in question; but at the time there was nothing requiring the deceased to go onto the car, as he could easily walk the short distance necessary to couple on the other car.

The deceased had frequently ascended and descended this ladder in question, and others on other coal cars of the Green Bay and Min-

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nesota road, constructed in the same way as this, and having the same general appearance, and was familiar with the car and the ladder. The train on which the deceased was so employed had for a long time been in the habit of landing almost daily other foreign cars having ladders at the end, including cars from the Baltimore and Ohio R. R., the Lake Shore and Michigan Southern, the New York Central, the Hudson River, the Grand Trunk, the Pittsburg and Fort Wayne, the Chicago, Rock Island and Pacific, and other railroads; and no injury had previously been known to occur from such ladders or from any defect in such ladders. At the close of the testimony on the part of the plaintiff the defendant moved for a nonsuit on the ground that it appeared by the testimony of every witness that when the ladder, slat, or round was screwed upon the stanchion, no person looking at the head of the bolt, seeing it in the position in which it was, would have supposed, or been charged with any reason to suppose, that it was other and different from what it appeared to be, and from what ladders of similar description, bolted in a similar manner to that, would be presumed to be, and would have been presumed to have been constructed originally. The court granted the motion substantially upon the grounds stated, and in doing so the trial judge, among other things said: "I understand the testimony of the plaintiff that the defect which caused this injury was the drawing out of the screws which held the rung upon the stanchion. All the witnesses agree that substantially there was nothing externally that would indicate that the bolt was not of the ordinary depth or length that is used in such places, to wit, three inches to three and a half; that the head would indicate the diameter. All that have said anything upon the subject have given the opinion, and all the experts, that had the bolt been of such a length as is usual in such places it would not have pulled out, in their judgment. Clearly and fairly, that being so, the evidence to me shows conclusively that no degree of care that the railroad would be called upon to exercise would have discovered the defect, to wit, the drawing out of the bolt."

From the judgment of nonsuit thereupon entered this appeal is brought.

Gabe Bouck, for appellant.

W. F. Vilas, for respondent.

CASSODAY, J.—The gist of the complaint is that the intestate came to his death by the wrongful act, negligence, and default of the defendant, and without any fault, carelessness, or negligence on his part. The cause of the action accrued prior to the repeal of section 1816, Rev. St., and was expressly saved by the repealing act (chapter 232, Laws 1880), and hence must be governed by that section. The intestate was, at the time he was killed, a servant of the defendant, and the only question to be determined is whether

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his death was caused by reason of the negligence of any other agent or servant of the defendant, without contributory negligence on the part of the deceased. Gumz v. Ry. Co., 52 Wis. 676. Clearly, under that section, the burden was upon the plaintiff of proving that such death was by reason of the negligence of some "other agent or servant" of the defendant. There is no claim of any negligence on the part of the conductor of the train. There is no claim that the engineer was negligent in starting the engine and car, and running them in the manner and with the speed he did. On the contrary the evidence is undisputed that he started these in pursuance of the signal and command of the deceased. Manifestly the only defect which at all contributed to the injury was the shortness of the bolt fastening the slat or round in question to the standard or stanchion.

Was the defendant guilty of negligence by taking that car loaded with charcoal from another railroad and handling it as it did? A very careful reading and rereading of the printed case forces upon us the conviction that the learned circuit judge's summary of the evidence above given, as to the defendant's negligence, is substantially correct. It is true, the evidence tended to show that the head of such bolts indicate their size, and that the head of the bolt in question indicated that it was three eighths or seven sixteenths of an inch thick, whereas such bolts were ordinarily one half an inch thick. But the difference was very slight, and, as stated by the trial judge, there was no breakage of the bolt, but it pulled out solely by reason of being too short, and hence not having penetrated the stanchion to a sufficient depth. From the evidence it is clear that had the penetration been of sufficient depth it would not have broken nor pulled out. It is true that one of the witnesses, who had once been discharged from the defendant's employ, and testified with an apparent bias, did say, in one portion of his testimony, that the head of the bolt indicated that it was too short, but after a rigid cross-examination he was compelled reluctantly to admit what all the other witnesses most clearly state, and what reason fully corroborates, and that is, that no one could tell from simply looking at the head of the bolt what its length was.

It is true, one of the witnesses states that he examined the other rounds in the ladder on this car, and the bolts, and that they seemed to be half-inch bolts. It does not appear, however, that the heads of such other bolts were any larger than the one in question. On the contrary, it was stated on the argument, without any dissent, that the evidence indicated that the heads of the bolts were apparently alike. This we assume to be correct, especially as it was stated without contradiction that much of the evidence was not printed. But even if there was a slight difference in the size of the bolts, indicating one eighth or one sixteenth of an inch difference in the size of the bolts, yet, since it is clear from the evidence

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that the injury did not result from insufficiency in size, it would seem to be immaterial. It is true, as urged by the learned counsel for the plaintiff, that there was some discoloration on the stanchion just below the slat or round in question, and immediately under the place where the bolt in question penetrated the same, caused by water and rust passing down between the slat or round and the stanchion. But, from the evidence, such discoloration seems to be quite common, and does not necessarily imply rot nor substantial decay. The car was rough, and so was the use to which it was put; but roughness in appearance does not necessarily imply want of strength.

Had the conductor, or any other agent or servant of the defendant, prior to the injury, known of the shortness of the bolt, and the condition of that part of the stanchion directly under the slat or round, as they were revealed on examination after it came off, then such use after such knowledge would have been negligence within the meaning of the statute; and in such case, if the deceased was free from contributory negligence, there would be no question but what the plaintiff could recover. But the evidence fails to show that any agent or servant of the defendant had any such knowledge, or any knowledge, of any condition of the ladder or car, perceivable to the eye, which would naturally induce a man of ordinary skill in such matters, in the exercise of ordinary care, to discover the precise defect which led to the injury. Of course it was discoverable by taking out the bolts and looking beneath the slats or rounds. So the sufficiency of the bolts, as to length as well as size, might have been determined by the application of a heavy weight, or by a strong man, or some machine wrenching the same. Assuming that some such test should have been applied, the questions would remain, when, by whom, and how frequently? If properly tested by the manufacturer, then is it to be repeated by the purchaser and every one who uses the same? and if so, shall he go beyond ordinary inspection, while at rest or in use, to the extent of unmaking what has already been made?

There is much propriety in the law exacting rigid tests to the different parts in the first instance, and while a car is in the process of manufacture, which would be impracticable, if not impossible, to repeat every time a loaded car passed from one railway company to another. Is one railroad company receiving a loaded car from another railroad company bound to assume that such car was not properly made; that the materials used in its construction were unsuitable or defective; that the workmanship was unskilful? Or may the company so receiving properly assume that such loaded car was skilfully made of suitable materials, and that all the requisite tests in the manufacture of such car had been applied? Is the company so receiving bound not only to use such care as is required of those handling and drawing such car, but also such care as is re-

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quired of the manufacturer in the selection of materials, the application of tests, and the exercise of skill in the building? May not the company so receiving such loaded car, and without being chargeable with negligence, assume that all parts of such car which appear to be in good condition are in such condition? Is the law so exacting as to the management of railroad trains as to impute negligence in not discovering what ordinary care would fail to detect? Is the law so stringent in such a case as to infer negligence without any omission of duty? Reference to the authorities may aid us in the solution of some of these questions.

In Wedgwood *v.* Ry., 41 Wis. 478, the brakeman was injured while coupling freight cars by a large and long bolt being out of place, and, as alleged, unnecessarily projected. It was there held that "a master is liable for injuries suffered for his servant, where, by his own negligence or malfeasance, he had enhanced the risk to which the servant was exposed beyond the natural risk of the employment, or has knowingly, and without informing the servant, used defective machinery which has caused the injury." On a subsequent appeal of the same case it was held, in effect, that such projection of the bolt, if a defect, was an obvious one, readily detected by inspection, and hence that negligence might be inferred without the plaintiff proving that the defendant had actual notice of such defect. In this respect the case was clearly distinguishable from the one before us.

In Smith *v.* Ry., 42 Wis. 520, the brake staff or rod on a wood train broke just below the cog-wheel, near the top of the car, on account of an old crack or seam in the same, in consequence of which the plaintiff, who was brakeman on the train, was thrown upon the track and suffered severe injuries. The plaintiff in that case obtained a special verdict and judgment in his favor; but it was reversed "for the reason that there was no evidence which warranted the jury in finding that the defendant was guilty of negligence in not applying a proper and sufficient test to the brake-rod," notwithstanding the jury did find "that the defendant, by the exercise of ordinary care, skill, and diligence, might have known of the defect," though it did not. It did not appear whether the car with the defective rod had been purchased by the company or manufactured in its shops. "It was a new flat car, which had been taken into the train but two or three days prior to the accident, and appeared to be a good car." It appeared that the company applied the ordinary tests in manufacturing cars, and the ordinary inspection on the purchase of cars. But the opinion states that, apparently, "the defect in the brake rod was a latent one, which would not likely be detected or discovered by the usual examination or inspection of the car," and that "it would undoubtedly be impracticable to apply this to every brake-rod which is used upon defendant's cars, and, if compatible with the nature of the business,

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would be of doubtful utility. There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake-rod were inadequate, and not in accordance with the most approved methods, to justify the finding of the jury." Page 525. Again the court said: "The servant, then, takes the risks of the employment, and of a failure of the machinery from any latent defect not discovered by practical tests." Page 526. Such was the language of this court as to the degree of care requisite in a railroad company using cars manufactured or purchased by the company so using the same. Certainly the rule cannot be less favorable to a railway company which neither manufactured nor purchased the defective car, but merely received it, loaded with charcoal, from another company, for the simple purpose of drawing it to the place of consignment and then returning the empty car.

In Morrison *v.* Co., 44 Wis. 405, the injury was caused by the breaking of a wheel under a freight car in the train, which threw the car containing the plaintiff's horses from the track. The track was in good order; the wheel had been used only a short time, and upon inspection after the accident showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company, and it was "held that there was no error in directing a verdict for the defendant." It is true, the liability of the defendant in that case was limited by the contract of carriage, but that does not render the decision inapplicable, because it was made to "turn and be determined upon the question whether the defendant was careless, negligent, or in fault in producing the injury complained of." Page 409.

In Steffen *v.* Ry., 46 Wis. 265, the late chief justice said: "There may be latent risks in an employment. Where these are known to the master it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In Co. *v.* Hightower, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge, or might have had knowledge of the defect by the use of reasonable diligence." Ry. *v.* Tay, 91 Ill. 474.

In De Graff *v.* Ry., 76 N. Y. 125, the brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake chains to see if they were in their place and apparently sound, but

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did not test their strength." The court, however, from all the evidence, "held that the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that it could have been discovered by the exercise of ordinary care, or that such care was not used; and that, therefore, a refusal to nonsuit was error."

In Walker *v.* Ry., 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. Thus the authorities seem pretty clearly to establish the rule that where the injury is the result of a latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care, such master will not be held liable. Here, as we have noticed, the car having the defective ladder was not manufactured by and did not belong to the defendant. It may be that the ladder was not constructed in the most approved method.

In Baldwin *v.* Ry., 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employee assumes in undertaking the employment." In such case it would seem, upon principle, that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See Davis *v.* Ry., 20 Mich. 105. Certainly a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. Ry. *v.* Gildersleeve, 33 Mich. 133. To hold, in such a case, that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would, in many instances, operate as a prohibition upon interstate commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employee, and the result of the neglect of that ordinary and reasonable care and diligence in furnishing sufficient and safe cars and machinery for the train which appertains to that particular branch of business. Ry. *v.* Barber, 5 Ohio St. 541.

It appears from the testimony that the ladder in question was

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almost in constant use, not by the engineer, nor so much by the conductor, but by the brakeman. The straining test was necessarily applied whenever the brakeman ascended or descended the ladder in question. Such constant use was necessarily by men having eyes, and hence, when the car was in use, the ladder must have received frequent inspection. The defendant company could only inspect and test by the agency of some employee present at the ladder. The brakeman was such employee, and apparently the only one having, at the time in question, charge of the brake on the car, as he had frequently had before, and necessarily tested and inspected the ladder, the insufficiency of which is now complained of. His inspection and testing was the company's inspection and testing. His failure to discover any visible indications of insufficiency, while so inspecting and testing, was no more culpable in the company than in himself. Is it logical to hold that, in such practical testing and inspection, his failure to notice visible indications of insufficiency was the exercise of ordinary care, and yet that the invisible entity known as the corporation, looking through his eyes, and using his feet and hands, as much as any other servant of the company, was guilty of negligence in omitting to detect and guard against what he failed to discover? Was the insufficiency of the ladder latent as to the brakeman using the same, but patent as to the company for whom he so used it? Or can it be said that the company was in the exercise of ordinary care so far as inspecting and testing by its brakeman present at the ladder was concerned, but negligent by reason of the failure of some unnamed servant, not present, to apply some unnamed test?

These brakemen, to use the language of Ryan, C. J., in Steffen *v.* Ry., supra, "appear to have been employed to perform this very duty . . . at the locus in quo." Is the standard of ordinary care of the corporation, acting through the brakeman on the part of the company, so much more stringent than on the part of the brakeman, acting for himself, and in view of his own personal safety and life? In the Ohio case cited, the conductor sued the company for injuries sustained by reason of defective cars, but he was "held to ordinary and reasonable care and diligence, not only in the management of the train, but also in the due inspection of the cars, machinery, and apparatus of the train, as to their sufficiency and safety." Of course, the company is required to use proper care in furnishing safe and sufficient cars and machinery for the train, but that does not relieve the employees from the exercise of ordinary care. Whether ordinary care requires such employee to inspect or test the part of the car or machinery which so turns out to be defective, would seem to depend very much upon the character of the particular employment, and his relation to and connection with such defective part prior to the injury. It has frequently been held that "an employee who has knowledge of defects in machin-

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ery about which he is employed, or who might know them by the exercise of reasonable care, cannot maintain an action for injuries resulting therefrom, if he continues in the employment without objection." Way *v.* Ry., 40 Iowa, 341; Kray *v.* Ry., 32 Iowa, 357; McGilynn *v.* Brodie, 31 Cal. 376; Devitt *v.* Pacific Ry., 50 Mo. 302; Dillon *v.* Ry., 3 Dill. C. C. R. 320; Sullivan *v.* Co., 113 Mass. 396; Ry. *v.* Black, 88 Ill. 112.

In Hayden *v.* Co., 29 Conn. 548, it was held that "an employee cannot recover for an injury suffered in the course of his employment, from a defect in the machinery used by his employer, unless the employer knew or ought to have known of the defect, and the employee did not know of it or had not equal means of knowledge." The fairness of such a rule cannot well be questioned, as it places both parties upon an equality; and it is not materially different from the rule frequently recognized by this court. Dorsey *v.* Co., 42 Wis. 583; Flanagen *v.* Ry., 45 Wis. 98; S. C., 50 Wis. 462 [S. C. Am. & Eng. R. R. Cas. 150]. See, also, Clarke *v.* Ry., 2 A. & E. R. Cas. 240; Smith *v.* Potter, 2 Am. & Eng. R. R. Cas. 140.

Beyond question the fastening of the slat or round was insufficient, and was culpable negligence on the part of the person or corporation under whose supervision it was so fastened; but, since it was in apparent good condition, we do not think the defendant receiving the car loaded for transportation and handling it is guilty of the neglect of another to one of its servants in the habit of handling the same car, and having the same knowledge and means of knowledge as the defendant. Besides, we are to remember that at the time of the injury the slat or round in question must have received an unusually severe strain from the swinging, wrenching method which the deceased adopted to board the car, and which boarding at the time was purely a matter of his own choice, and without necessity.

For the reasons given the judgment of the circuit court is affirmed.

TAYLOR, J., dissenting.—This action is brought to recover damages for negligently causing the death of Thomas Ballou. The evidence on the trial shows that the deceased had been a brakeman in the employ of the defendant company for several years previous to his death, working on the appellant's road between Green Bay and south of that point; that he was killed at Depere while assisting in the moving of some cars at that point. His death was caused by the giving way of one of the rungs of the ladder while he was attempting to ascend the same to the top of the car. The ladder was at the end of the car, and when the rung of the ladder gave way he fell in front of the moving car, and was run over and instantly killed. It appears that, in order to mount the ladder, the deceased took hold of one of the rungs of the ladder, threw

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his feet upon the bumper, then reached up and seized the rung above with his other hand, and so in straightening himself to get on the ladder most of his weight would come upon the upper hand, and the rung giving way before he was straightened up on the ladder, he necessarily fell to the ground and was run over by the car and killed.

The reason why the rung gave way was apparent, when examined after the accident. The car was a coal car, made for hauling charcoal, and was originally a flat car. The box had been put on it by setting up oak stanchions around the sides and ends, fastened at the bottom to the bed of the car, and at the top by cross-timbers, which supported the deck or roof of the car, and was boarded up on the inside of the stanchions so that the frame-work of the car was on the outside. The ladder was made at one end by simply fastening flat slats or rungs to two of the stanchions which formed the box of the car, and these slats or rungs were fastened to the stanchions, at each end, by a single bolt, with a screw at the end, passing through the slat or rung into the stanchion. On examining the rung which gave way, it was found that the bolts at each end were too short, not penetrating the stanchions more than about a half inch, so that when the weight of the brakeman came upon it, combined with the outward strain which was given to it in his attempt to bring himself upon the ladder, it immediately gave way.

The evidence also shows that this car did not belong to the defendant company, but to the Green Bay and Minnesota R. R. Co., and was received by the defendant company at Green Bay to be hauled to Depere, where its loading was to be discharged, and then returned to the Green Bay Company at Green Bay; and that this and other cars of a like make had been frequently received by the defendant company from the Green Bay Company, for the purpose above specified, while the deceased had been in its employ. There is no dispute made by the defendant that the rung of the ladder which gave way was not, in fact, securely fastened, nor that, if it had been securely fastened, the accident would not have happened. That the bolts were too short is admitted by all. It was said by the learned counsel for the respondent company that the fastenings of the other rungs of the ladder had been examined after the accident, and it was found that the bolts in them were much longer than those in the rung which gave way; that the bolts in the remaining rungs entered the stanchions at least an inch and a half or two inches. There was, however, no evidence of this fact given on the trial.

One of the witnesses for the plaintiff, who examined the ladder shortly after the accident happened, testified that he found a hole in the stanchion just beside the place where the bolt which gave way entered the same, and that in that hole there appeared to be

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part of a bolt which seemed to have been broken off and left in the wood; and from this fact it may well be inferred that the rung which gave way had been put on in the place of another which had before that time occupied the same place, and had by some means been broken off, leaving a part of one of the bolts which held the same in the stanchion. This inference would be strengthened by what is alleged by the learned counsel for the respondent, that the remaining rungs were fastened with much longer bolts. Had they all been put on at the same time there is a strong presumption that the bolts fastening the same would have been of the same length. There was no evidence showing conclusively any contributory negligence on the part of the deceased.

There was some evidence given by the plaintiff tending to show that a competent mechanic could tell by the size of the bolt heads that they were both too short and too small for the purposes to which they were put, and also that there was some slight indication of decay in the wood at the place where the bolts penetrated the same. This evidence was, however, of a very unsatisfactory kind, and so slight in itself that I am not prepared to say it was sufficient to sustain a verdict in favor of the plaintiff, in the absence of any duty upon the part of the plaintiff to have ascertained the unsafe manner in which this fatal rung was fastened, except the duty which would arise by reason of the indications spoken of by the witness. There was no evidence given on the part of the defendant showing that any inspection had ever been made of this car by any person, either competent or incompetent, nor any evidence of what were the ordinary methods among railroads of inspecting cars which came to them from other roads. The learned circuit judge, on the motion of the respondent, nonsuited the plaintiff, and the plaintiff appeals to this court. It is admitted by the learned counsel for the respondent—and if it were not, it seems to me that it is too well settled to be controverted—that had this action been against the company which was the owner of the car and using the same, by an employee of that company who had been injured by the giving way of the rung in question, there could be no doubt as to the right of the plaintiff to a verdict upon the evidence offered in the case, or, at least, to have had the question of negligence on the part of the defendant submitted to the jury.

The evidence disclosed such a glaring defect in the construction of the ladder, so threatening to the lives and limbs of those who, in the discharge of their duties, were compelled to use it, that no court would say that it was not evidence tending to show a want of ordinary care on the part of the company in using so dangerous an appliance for the accomplishment of its work. If the rung was put on as a repair in place of another which had before given way, the company would be held liable for the careful making of such repair by the person or persons detailed by

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the company for that purpose. All the cases hold that the company must be treated in such case as doing the work in its individuality to the same extent as though the insubstantial entity which is called the corporation did the act itself. Its employee for that purpose is the company, and the carelessness or negligence of such employee is the carelessness or negligence of the corporation. To establish this doctrine it is unnecessary to look to other courts for authority. This court has determined the question for itself. Brabbits *v.* Ry. Co., 38 Wis. 289; Wedgwood *v.* Ry. Co., 41 Wis. 478; Schultz *v.* Ry. Co., 48 Wis. 375 [S. C., 4 N. W. Rep. 399].

My opinion is that the same rule would apply to the company owning and using the car, as between itself and one of its employees, wherever such company is itself the maker of such car or other machinery. I think that in such case, as between the corporation and employee, the corporation warrants that its appliances are made of sound material, and that the workmanship is not faulty, but is sufficient in every respect to answer the purposes for which they are intended; and that if the persons making such appliances are careless either in the use of materials or in the workmanship, and an injury occurs to an employee by reason of such carelessness in either respect, such carelessness is the carelessness of the corporation, and for such carelessness it is answerable. No defect is latent, so as to excuse the corporation, either in the materials or in the workmanship, which is known to its employees engaged in its manufacture, or which would have been known to them if they had exercised due care. Smith *v.* Ry. Co., 42 Wis. 520, 526. In the last case, the present chief justice, in delivering the opinion, quotes approvingly the following from the opinion in the case of Laning *v.* R. R. Co., 49 N. Y. 521: "That the duty of the master to the servant, or his implied contract with the servant, requires that the servant shall be under no risk from imperfect or inadequate machinery, or other material, means, or appliances, or from unskilful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant's use perfect and adequate physical means, and for his helpmates fit and competent fellow-servants; or due care used to that end. That some general agent, clothed with the power and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's nonperformance. It is for the master to do by himself or by some other. When it is done, and not till then, his duty is met or his contract kept."

And, after making the foregoing quotation, the chief justice adds: "The servant then takes the risks of the employment, and of a failure of the machinery from latent defects not discovered by

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practical tests. And this court, moreover, has held expressly that the negligence or misconduct of the officer or employee whose duty it is to attend to these things, and who, pro hac vice, represents the company in the matter, is the negligence or misconduct of the company itself." The same doctrine was approved by this court in the cases of Bessex *v.* Ry. Co., 45 Wis. 477, and Wedgwood *v.* Ry. Co., 41 Wis. 478; S. C., 44 Wis. 44. This doctrine is approved in Ford. *v.* Fitchburg R. Co., 110 Mass. 241. In that case the court state the rule as follows: "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must be always discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, to be relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to the servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even where the same person renders service by turns in each as the convenience of the employer may require." "The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition."

This language of the court in the Massachusetts case was quoted and approved by the Supreme Court of the United States in the case of Hough *v.* Ry. Co., 100 U. S. 213–219; and Mr. Justice Harlan, who wrote the opinion in that case, says:

"A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its officers and business in all its departments are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in a suitable condition, the machinery and apparatus to be used by its employees —an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the danger which may be encountered. Those at least in the organization who are invested with controlling or superior authority in that regard repre-

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sent its legal personality; their negligence from which injury results is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of the agent, who in exercising the master's authority has violated the duty he owes as well to the servant as to the corporation.

"To guard against misapplication of these principles we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for use of employees. Its duty, in that respect, to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees."

In the same case the learned justice quoted the language of Mr. Wharton as follows: "At the same time we must remember that when a master, personally or through his representatives, exercises due care in the purchase or construction of buildings and machinery, and in their repair, he cannot be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care either by himself or his representatives. The duty of repairing is his own, and, as we shall see hereafter, the better opinion is that he is directly liable for the negligence of agents when acting in this respect in his behalf. If the master knows, or in the exercise of due care might have known, that his structures or engines were insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty."

It seems to me that these authorities clearly establish the proposition above stated, that as to all machinery or appliances manufactured by the corporation and used by it there is a guarantee that such appliances so made and used are of sound materials, and that the workmanship is not faulty, and that if the materials are unsound or defective, or the workmanship is faulty, and an injury occurs to one of the employees by reason thereof, the company is liable to such employee for the damages resulting from such injury. In such case the bad materials are furnished and the faulty workmanship is done by the corporation itself. As to faulty workmanship there can be no excuse, and it can only be excused in the use of bad materials where the defects in them are latent, and could not be discovered by proper examinations and tests. Whether the same rule in its full extent would apply to the corporation where it purchased the machinery or appliance from some other party who is the maker, is, perhaps, a matter of some doubt upon the

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authorities. But if the strict rule above stated is not applicable to the case of purchased machinery or appliances, and that in such cases the master is not, as to his employees, a guarantor of the soundness of the materials and the perfection of the workmanship, he is certainly liable for all imperfections in the materials or workmanship which could be discovered by a thorough inspection, and the application of the most approved and efficient tests.

Under the rules above stated as to the duty of the maker or purchaser of machinery to his employee, it will hardly admit of a doubt that the master ought to have ascertained so palpable and dangerous a defect as existed in this case. At all events, the existence of such a defect would have been evidence of a want of due care on the part of the master from which a jury might well have found negligence on the part of the master either in making a proper inspection, or in applying the proper tests. But it is urged that a railroad company which receives a car from another company to transport over its road for a greater or less distance is not under the same obligation to the employees to see that it is safe and perfect in all its parts. And this was so held by the supreme court of Michigan in the case of Smith *v.* Potter, 2 Am. and Eng. R. Cas. 140. In that case, however, considerable stress was laid upon the fact that in the State of Michigan every railroad was bound by law "to receive and forward cars of other roads impartially and diligently." The court held, among other things, that this law did not compel a railroad to receive or transport cars unfit for passage, or that the company required to receive the cars might not detain them long enough to make a sufficient inspection of them in order to determine their fitness. It also held that the inspectors whose duty it was to inspect the cars which came on the road from other roads were co-employees with the other employees of such road, and that for their negligence in not making a proper inspection of the cars so received, by reason whereof a defective car was received and a brakeman was injured thereby, held the brakeman could not recover.

I know of no law in this State which compels one railroad company to receive and transport the cars of other roads over its line when requested to do so; but I am free to admit that such is not only the practice, but that, for the convenience of trade and commerce, it is a method of doing business which should receive the approval of the courts as absolutely necessary to the proper, cheap, and speedy transaction of business over the roads of the country. The determination of the Michigan court that the inspectors of cars, whose duty it is to see that they are in proper repair, and when out of repair to see that proper repairs are made, are co-employees with the persons whose duty it is to use the machinery and other appliances furnished by the master, is not sustained by the authorities above cited, and that doctrine was expressly repudiated by this

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court in the case of Schultz *v.* Ry. Co., supra. But if that were the doctrine it would not affect the decision of this case, which arose under our statute, which makes the company liable for an injury to one of the employees, when such injury is the result of the negligence of a co-employee.

If we admit that a less stringent rule as to care and diligence shall be required of the railroad company in respect to the cars which they receive from other companies and draw over their road for the mutual benefit of both companies and in the general interest of trade, a proposition which is perhaps doubtful under the authorities (see Stetler *v.* Ry. Co., 49 Wis. 609; S. C., 46 Wis. 497–503; R. R. *v.* Barron, 5 Wall. 90; McElroy *v.* R. R. Co., 4 Cush. 400; Nelson *v.* R. R. Co., 26 Vt. 717; 2 Redfield, Rys., 302 303; R. R. *v.* Karman, 30 Ill. 272; Shopman *v.* Ry. Co., 9 Cush. 24), still such fact does not release the company from all obligation to protect its employees against the dangers resulting from imperfect machinery and appliances. That duty still rests upon the company, and its duty in that respect must be performed with the utmost care and diligence consistent with the performance of its duty to the interest of trade and commerce. If it be admitted that the necessities of business are such that the safety of life and limb of the employees of railroads must be put in some jeopardy as a sacrifice to such necessities, certainly the lives of the employees are not to be unnecessarily sacrificed to such interests. It seems to me that the companies should be held to the exercise of all the care and diligence to protect its employees from the defects of cars coming on their tracks which is consistent with the necessities of business. As was said by the Michigan court, although the statute requires one company to receive and transport cars which are offered to them for that purpose, still it is not required to receive or transport cars which are unfit to be used, or threaten danger or death to its employees.

There was certainly a duty imposed upon the defendant company to exercise some degree of care to prevent the transportation over its line of road of any cars or appliances of other companies which were so defective in their construction, or which had become so defective by use, as to be unfit for further use, and which, on account thereof, endangered the lives or limbs of its employees. There is also a well-defined rule that the care required of the company is, in some degree, measured by the consequences which are likely to result from a defect in any part of the machines or appliances in use by its employees. If no evil results are likely to fall upon the employee from a defective piece of machinery or other thing in use by the company, or if such results would not follow ordinarily by their use, it is plain that the degree of care required of the company would not be the same as though very serious injuries were likely to follow therefrom.

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In the case at bar a defective ladder placed, as the one in question was, at the end of the car, was one of the most dangerous appliances the company could possibly furnish its employees. It is well-known that the employee is frequently required, in the discharge of his duty, either to ascend or descend such ladder while the car to which it is attached is in motion. Any defect therein which would throw the employee therefrom while so using it, would be likely to result in his death, or some very great bodily injury. The result of the defect in this case is one which would be likely to happen in every case where a like defect existed. The plaintiff made clear proof of the defect which caused the death of the deceased. The defect was of such character as would clearly charge the owner with knowledge thereof if the ladder had been constructed by the owner or its employees, or if the defect had been caused by the repair of such ladder after it had been made. If the owner of the car had purchased it ready-made, and the defect of the ladder had been in its original construction, such owner would also be chargeable with knowledge of such defect, if it could have been discovered by proper tests and inspection; and if, while in use by such purchaser, the defect in the ladder had resulted from the carelessness of its employees in repairing the same, then such purchaser would have been charged with a knowledge of the defect absolutely, in like manner as though the defect had been in the original construction and the owner was the constructor. Had the defendant company been the owner of the car to which the defective ladder was attached, I think it quite clear that the evidence produced by the plaintiff would have been ample, unexplained, and uncontradicted to have entitled her to have the question of the negligence of the defendant submitted to the jury, and I do not understand that my brethren differ with me in opinion upon that point.

Does this evidence tend to prove the defendant company guilty of negligence? My brethren hold that it does not, because it appears that it was not the owner of the car, but had received it from another company for transportation over its road. With all proper respect for the opinion of my brethren, I am unable to agree to this proposition. It may be true that, as between the company receiving cars for transportation and the company furnishing them, the company receiving the same may rely upon the presumption that the cars are fit for use, and that the furnishing company has made such test and inspection thereof as would show their fitness for such use. And, possibly, as between the two companies, the receiving company is not bound to make any inspection thereof before using them, in order to charge the furnishing company with any damages which might result from that use by reason of any defects existing at the time they were received. There is, no doubt, an implied warranty on the part of the furnishing company

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that the cars are reasonably fit for use, and, unless the defect be plainly visible, there is, as between these parties, no duty on the part of the receiving company to make any particular examination for defects; and if injury results from the use of the cars from defects which ought to have been known to the furnishing company, such company would, undoubtedly, be liable to make good the damages.

This rule as to the duty of the receiving company, as between itself and the furnishing company, is not, in my opinion, the rule as to the duty of the receiving company to its employees. The fact that the car is not its own does not relieve the company using it from its general obligation not to subject its employees to unnecessary danger by the use of imperfect or defective machinery or appliances. This obligation is continuous and universal, and it cannot relieve itself of such obligation by pleading that it was not the owner of the car or machinery, and that the owner had warranted its perfection and fitness for use, and that it relied on such warranty. If that rule should be adopted in a case of this kind, there does not seem to be any good reason why the company might not in like manner relieve itself from liability to its employees for defects in any machinery which it had bought from any person or corporation, with a like implied warranty as to its sufficiency, without showing any tests or inspection in order to ascertain its sufficiency.

It seems to me that the liability of the company as to its employees is the same whether the company has purchased the defective machinery or cars, or whether it has received them for use upon its road from another company. There certainly can be no doubt upon this point as to such machines or cars as the company lease from the owner for a definite term, and use upon their road. In cases like the one at bar, the receiving company takes the car and transports it for its own benefit, and only incidentally for the benefit of the furnishing company. It would seem that in such case the cars transported, as between the company transporting them and the employees, should be treated as the cars of such company. While in use the receiving company has the absolute control of the same—as much so as of any car owned by the company. Any negligence which can be imputed to the purchaser of a car, as between itself and its employees, in not purchasing perfect and suitable cars for use, must be imputed to the company which receives upon its road for transportation the cars of another company. If the convenience of business prevents the receiving company from making such inspection and tests of the cars received as are usually made and required of a company purchasing or leasing cars for its permanent use, and it is compelled to rely upon the vigilance of the company from which the cars are received to detect imperfections therein, then, as between itself and its employees, the want of vigilance on the part of the company purchasing the

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cars must, as between the company using the same and its employees, be imputed to the company using them, and such employee may recover damages for any injury resulting to him from a defect in such car which ought to have been discovered by the company furnishing them, either from the master in whose use the car was at the time of the injury, or from the owner of the car.

There is, perhaps, some analogy between a case of this kind and that of a city or other municipality which permits a citizen to make excavations or do other acts in its public streets which are dangerous to the public. In such cases, if the citizen doing the work in the street does it in a careless manner, so as to endanger the safety of the traveller, and injury occurs to the traveller by reason of such neglect, the neglect of the person doing the work in the street is imputed to the municipality, and the party injured may have his action for the injury against the municipality, or the person whose negligent acts caused the injury. The cars of one company used by another on its road, and as to which cars it is the duty of the employees of the company using the same to handle, manage, and care for, the same as other cars owned by the company, must be treated for the time being as the cars of the company using them, and the company so using them should be held to the same responsibility to the employees for their safety as though it was the owner of them. No other rule will furnish any protection to its employees, and, if not enforced, then as to cars transported by the company over its line not owned by it, its employees will be subjected to the risk of life and limb from defects which show criminal negligence on the part of the owners of the cars, without remedy, unless they seek it from the corporations owning them.

Every person who has observed a passing freight train on one of our great railroads, knows that it is, as a general rule, made up of cars owned by several independent railroad companies, and many trains will be made up of cars owned by railroad companies located in distant States. Shall the employee, whose duty to his employer required him to care for and manage all these cars in like manner, when injured by a defect which ought to have been known to the company owning the same, be told that he must seek his remedy of that company located in New England, New York, or some other State, so far from his locality as to render his remedy almost hopeless of any beneficial results, or shall he be permitted to say to his employer: "These cars are transported by you for your exclusive benefit, so far as they pass over your road. You have employed me to care for and manage alike all cars which you choose to transport, and under the general and well-established rules of law you are bound to see to it that you do not endanger my life or limbs unnecessarily by the use of cars which, by reason of imperfections, are dangerous." It seems to me that there should be but one rule as to all cars used. The company, for the time being, and

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while the cars are in use by it, should, as between it and its employees, be deemed the owner thereof.

The fact that in this case the company owning the car and the company using it are both located in this State, and the fact that the company using the car transported it but a few miles, can have no effect in changing the liability of the company using and transporting the same. If the defendant company be not liable for the defect in this car, then it would not be liable though the car were owned by some New England corporation, and though it had been transported over its line from Chicago to Omaha or Dakota. It seems to me that justice to the employee requires that the company using a car and transporting it over its road must be held to the same liability, as between itself and its employee, as though it owned the same, and had acquired its title by purchase, and that, as between itself and its employees, it must be held responsible for all defects which it would be liable for had it been the owner by purchase. Any less degree of responsibility will furnish no protection to the employee against the use by his employer of the most dangerous cars, engines, and other appliances. This rule will work no injustice to the railroads. It is for their convenience that an interchange of cars should be made, as well as for the convenience of the public and the rapid transaction of business; and if, as suggested above, it is impracticable to make a thorough inspection of cars at every transfer from one company to another, still the owning company sending out its cars guarantees to all other companies receiving them that they are reasonably fit for use, and if they are not, and any damage occurs to the company or companies receiving and transporting them, either directly by an injury to their railroad cars or other property, or indirectly by an injury to its employees, for which it is compelled to make compensation, such receiving company can recover over against the company owning the cars and furnishing them for transportation. Any other rule than the one suggested leaves the employee entirely remediless against his employer, as the result reached by the decision in this case shows.

The circuit court nonsuited the plaintiff, although she showed that her husband had been killed by a defect either in the original construction of the car, or in its subsequent repair, so gross in its character as showed criminal carelessness on the part of the maker or repairer. This nonsuit can only be sustained on the theory that the defendant using this car was bound to make no inspection or tests which would have discovered the defect; that to make the defendant using the car liable for a defect in the construction or repair, the defect must be such that it is apparent to the casual observer by looking at the same. This rule comes very near excusing the defendant altogether. It requires the injured party to show affirmatively either that some responsible officer, agent, or employee of the company, whose duty it was to see that its cars were kept

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in repair, knew of the defect before the accident happened, or that he might have known it by the sense of sight, without any other aid, and without any test of any kind. This rule relieves the company from liability for any defect not visible It imposes no duty on the company to make examination for any defects not visible. And, as in the case of defects which were so palpable as to be readily apparent to the casual observer, it would be quite difficult for the employee to recover for an injury resulting therefrom. The result of the ruling of the court in this case will be that no recovery can be had in any similar case unless the employee could prove that some responsible employee of the company had in fact made an examination, which he was not bound by any rule of law to make, and so had discovered the defect before the accident happened.

The rule laid down by the supreme court of the United States in the case of the Pennsylvania Co. *v.* Ray, 102 U. S. 451, as to the liability of a railroad company to its passengers for injuries received by reason of the defective construction of a car constituting a part of the train, not owned by them, and for the use of which the passenger pays another company a separate charge, is, I think, strictly applicable to the liability of the company to its employee for an injury received by reason of a defective car owned by another company, but transported and used for the time being by the master company, and in regard to which car the duties of the employee are the same as if such company owned the same: "The only distinction is in the degree of care which the company is bound to exercise in the two cases. In its relation to the passenger, the company is bound to exercise the utmost caution characteristic of very careful judgment, and is responsible for injuries resulting to a passenger which might have been avoided by extraordinary vigilance, aided by the highest skill."

In its relations to its employees, the company is bound to exercise a less degree of care and skill in furnishing and keeping in repair its cars and machinery for the use of its employees, and the least degree of care and skill required is such as an ordinarily careful and skilful man would use under like circumstances. And the degree of care and skill required, as above remarked, is modified by the dangerous consequences which are likely to result to its employees from the use of the particular machine or appliance, if defective or imperfect. In the opinion in the case above referred to, the court, after stating the strictness of the obligation of the carrier to protect him against any damage, says: "These doctrines, to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others.

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. . . The duty of the railroad company was to convey the passenger over its line. In performing that duty it could not, consistently with the law and obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made,—if it elected to reserve or exercise no such control or right of inspection from time to time, of the sleeping cars which it used in conveying passengers, as it should exercise over its own cars,—it is chargeable with negligence or failure of duty. . . . The law will not permit a railroad company engaged in the business of carrying passengers for hire, through any device or arrangement with a sleeping-car company whose cars are used by, and constitute a part of, the train of the railroad company, to throw off the duty of providing means for the safe conveyance of those whom it agrees to convey."

This language is strictly applicable to the duty of the company to its employees, except as to the degree of care and skill to be used in the selection and maintenance of suitable and safe cars, engines, machinery, and appliances for the use of its employees. The duty of the employee being to look after, use, and manage all cars in use upon his employer's road, the duty of the employer should be the same in respect to all such cars, no matter by whom owned, to see that they are in a reasonably safe condition for use upon its road; and the reasons for holding the company to such liability to its employees is full as strong as the reason for holding it responsible to its passengers under like circumstances.

If it be admitted that the defendant company in this case was charged with any duty, as between itself and its employee, to see that the ladder which caused the injury was in a reasonably safe condition for his use at the time the accident happened, then it appears to me it was error to nonsuit the plaintiff upon the evidence produced by him. If it be said that the defect was, in some sense, a secret defect, still it was not such a defect as might not have been easily discovered by tests and examinations; and, in the absence of all proof that the company had made any examination or tests for the purpose of discovering the defect, it presented a question of fact for the jury to determine whether reasonable inspection or tests would have discovered it, and not a question of law for the court.

The plaintiff having shown gross carelessness either in the construction or repair of the ladder, the evidence tended to prove carelessness on the part of the company. If it was charged with any care in regard to the car at all, it would seem that, in order to exonerate itself, it should have shown that no inspection or tests which are made by railroad companies of its cars and their appliances would have discovered the defect; or, at least, it should have

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shown that it made such inspection and tests, by competent men, as are made by railroad companies generally, and that the defect was not discovered. It is certainly a question of fact and not of law, whether a proper inspection or test of the ladder would have discovered the defect in the ladder; yet the learned circuit judge determined, as a question of law, that no proper inspection or test would have discovered such defect. How can the learned circuit judge, or the judges of this court, know that a proper inspection and test would not have discovered the defect? I think it quite probable that neither would have been competent, as a witness, to have expressed an opinion as an expert as to what would be a proper inspection of the car and its appliances, nor whether such proper inspection would have been likely to have discovered the defect in question. How, then, can we say that no reasonable inspection or tests would have discovered this defect? And yet that is what was said by the learned circuit judge, without any proof to enlighten him upon that subject.

It is, I think, apparent that the ruling of the learned circuit judge can only be upheld by holding that as to this car, not owned by the defendant, it owed no duty to its employee to see that it was in a safe condition for use upon its road; that, as is said in the opinion of the court in this case, the defendant company had the right to presume that proper inspection and tests had been made by the company owning the car, and from which the defendant received it, and that consequently there was no duty of inspection or tests imposed upon the defendant. I cannot bring myself to that conclusion. I think the law is and should be otherwise. If a railroad company receives upon its road, for transportation, the cars of another road, and requires the employees to look after and care for them, the same as it does as to its own, the obligation to see that they are reasonably safe for use rests upon the company the same as though it was the owner. As I have said above, no other rule will be just, or furnish any protection to the employee.

The assumption in this case that reasonable care on the part of the defendant company would not have discovered the defect which caused the injury, is the assumption of a fact not proved in the case, and to support which there is no evidence. The other assumption, that there was any duty imposed on the brakeman to make inspection of the car or ladder to see whether it was fit or safe for use, is an assumption based upon no proof, and is in no sense a question of law, except so far as the law might charge the brakeman with knowledge of a plain and visible defect, and defeat a recovery because the defect was so plain and visible that he could not but have known of its existence, and consequently took the risk of using that which was clearly dangerous to use. The effect of the decision in this case must be, I think, to discharge the railroad company from any care or diligence in furnishing safe or suitable

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cars, machines, or appliances for the use of its employees, in all cases where the company is not the owner of them, no matter what the defect in the construction or repairs made upon the same, unless such defect is patent to the most casual observer; and where it is so patent it is probable the employee could not recover, because he would be equally chargeable with notice of the defect as the company. To such a doctrine of responsibility of the master to his employee I cannot assent.

In my opinion the circuit judge erred in taking the case from the jury and directing a nonsuit, and for that reason the judgment ought to be reversed.

The important question raised in the above case is the obligation of railroad companies to provide safe and suitable machinery and other means for their employees to prosecute their work. The principles governing this subject are few and simple. The difficulty lies only in their practical application. Without endeavoring to cumber these pages with the detail of decided cases, an attempt will be made to state broadly the accepted doctrines upon the point, adding such authorities, selected from the great mass of decisions both in this country and in England, as will best illustrate the state of the law. In the first place it may be said that, as a general principle, railroad companies are bound to furnish to their employees safe and suitable engines, rolling-stock, track, etc., etc., for carrying on their employment. But their duty in this respect is by no means the same which they owe to passengers. All appliances must as to them be perfect and of the very best make, otherwise the company is liable—it is, indeed, an insurer of passengers' safety. But a railroad company is in no sense an insurer of its employees' safety. The engines and cars must, for example, as to them, be of good workmanship and adapted to the purpose, and the track must be fairly laid and ballasted. But the rolling stock need not be absolutely free from defect, neither need the track be in absolutely perfect repair. Reasonable care and attention on the part of the company is all that the law requires. Hayden v. Smithville Mfg. Co., 29 Conn. 249; Toledo, etc., R. R. Co. v. Asbury, 84 Ill. 429; St. Louis, etc., R. R. Co. v. Valerius, 56 Ind. 512; Muldowney v. Ill. Cent. R. R. Co., 39 Iowa, 615; Shanny v. Adroscoggin Mills, 66 Me. 420; Cumberland R. R. Co. v. State, 45 Md. 229; Arkerson v. Dennison, 117 Mass. 407; Botsford v. Michigan, etc., R. R. Co., 33 Mich. 256; LeClaire v. First Div., etc., Ry. Co., 23 Minn. 9; Nolan v. Shackle, 3 Mo. App. 300; Fifield v. Northern R. R. Co., 42 N. J. 225; Paulmier v. Erie R. R. Co., 34 N. J. L. 151; Booth v. Boston, etc., R. R. Co., 67 N. Y. 593; Hardy v. Carolina, etc., R. R. Co., 76 N. C. 5; Mullan v. Phila., etc., Ry. Co., 78 Pa. St. 25; Nashville, etc., R. R. Co. v. Jones, 9 Heisk. 27; International Ry. Co. v. Doyle, 49 Tex. 190; Dasey v. Phillips, etc., Co., 42 Wis. 583. Hough. v. Texas and Pac. R. R. Co., 100 U. S. 213; Indianapolis, etc., R. R. Co. v. Flanigan, 77 Ill. 365; Laning v. N. Y. etc., R. Co., 49 N. Y. 521; Ryan v. Fowler, 24 N. Y. 510; Seaver v. Boston & Me. Ry. Co., 14 Gray, 466; Park v. O'Brien, 23 Conn. 239; Norris v. Litchfield, 35 N. H. 271; Wright v. N. Y. Central R. R. Co., 25 N. Y. 562.

The same principle applies as regards the discarding of old machinery and the substitution of new and improved inventions. With regard to passengers it is the duty of the company to adopt the new inventions as soon as they have been tested and practically found to afford greater safety than the old ones. As regards employees, this is not the case. The company cannot escape liability, it is true, if an accident occur through the use of very anti-

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quated machinery. But it is equally clear that it may escape liability if the cause of the accident be merely a failure on its part promptly to adopt the latest inventions. Reasonable care and prudence in this regard is all that the law demands. Fort Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Botsford v. Mich., etc., R. R. Co., 33 Mich. 256; Western, etc., Ry. Co. v. Bishop, 50 Ga. 465; Wonder v. Balt., etc., R. R. Co., 32 Md. 411; Salters v. Delaware, etc., Canal Co., 3 Hun, 338; Stack v. Patterson, 6 Phila. 225; Devitt v. Pacific R. R. Co., 50 Mo. 302; Dynen v. Leach, L. J. (Exch.) 221.

Some authorities, it is true, deny this principle. In Indiana it has been held that the measure of duty on the part of a railroad company to its employees, as regards the adoption of new inventions, is almost, if not quite, as strict as that enforced towards passengers. St. Louis, etc., R. R. Co. v. Valerius, 56 Ind. 511.

Other courts have gone to the opposite extreme, holding that in no case will a company be liable to its employees for an accident occurring through the use of antiquated machinery, unless the danger or defect of the same be extraordinarily plain. Hayden v. Smithville Mfg. Co., 29 Conn. 548; Kelley v. Silver Spring Mining Co., 7 Rep. 60.

The wisdom of the middle course first stated is obvious. Much of the business of the country is necessarily carried on with appliances not the newest of their kind. To oblige all railroad companies to provide for the safety of their servants by at once discarding such appliances as soon as new ones are devised, would be folly. But to permit them to continue the use of those appliances long after they had gone out of date, and thus wantonly endanger the lives of their employees, would be holding out a premium to criminal negligence. In medio tutissimus ibis.

The duty of railroad companies to their employees does not, however, terminate with furnishing proper appliances. It is also their duty to keep those appliances in suitable repair. They are, of course, obliged to furnish those repairs if notice is actually brought home to them that such are needed. Boyle v. Mowry, 12 Mass. 251. And for this purpose notice to the manager or superintendent of that portion of the company's works will be taken to be notice to the company. Frazier v. Penn. R. R. Co., 38 Pa. St. 104; Patterson v. Pittsburg, etc., R. R. Co., 76 Pa. St. 389; Brabbets v. Chicago, etc., R. R. Co., 38 Wis. 289; Gage v. Delaware, etc., R. R. Co., 14 Hun., 446; Nashville, etc., Ry. Co. v. Elliott, 1 Coldw. 611; 1 Chicago, etc., R. R. Co. v. Shannon, 43 Ill. 338; Paterson v. Wallace, 1 McG. 748.

In default of such notice the company is not generally bound to repair, unless, indeed, the defect be such as it ought to perceive. In the latter case it is equally bound as in the former. It cannot wilfully close its eyes and expect to escape liability. McMillan v. Saratoga, etc., R. R. Co., 20 Barb. 450; Columbus, etc., R. R. Co. v. Arnold, 31 Ind. 177; Toledo R. R. Co. v. Conroy, 61 Ill. 164; S. C., 68 Ill. 560; Walsh v. Peet Valve Mfg. Co., 110 Mass. 23, Mobile, etc., R. R. v. Thomas, 42 Ala. 672; Chicago, etc., R. R. Co. v. Sweet, 45 Ill. 197; Greenleaf v. Illinois, etc., R. R. Co., 59 Mo. 495; Ryan v. Fowler, 24 N. Y. 410; Schr. Norway v. Gensen, 52 Ill. 373; Chicago & Alton R. R. Co. v. Platt, 89 Ill. 141; East St. Louis Packing, etc., Co. v. Hightower, 92 Ill. 139; Fuller v. Sewett, 1 Eng. and Am. R. R. Cas. 109.

It is simply the statement of this principle in another shape to say that a railroad company is bound from time to time, at properly frequent intervals, to have its cars, tracks, engines and appliances generally tested and examined by competent experts. If in consequence of a failure to perform this duty an employee be injured the company will be held liable. Warner v. Erie R. R. Co., 39 N. Y. 468; Shanny v. Androscoggin Mills, 66 Me. 420; King v. New York, etc., R. R. Co., 4 Hun, 769; Laning v. N. Y. Central R. R. Co., 49 N. Y. 521; Harrison v. Central R. R. Co., 31 N. J. L. 293; Noyes v. Smith, 28 Vt. 59; Watling v. Oastler, L. R., 6 Exch. 74; Plank v. R. R Co.,

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60 N. Y. 607; Chicago, etc., R. R. Co. v. Sweet, 45 Ill. 197; DeGraff v. N. Y. Central R. R. Co., 76 N. Y. 175; Snow v. Housatonic R. R. Co., 8 Allen 441; Byron St. Printing Tel. Co., 26 Barb. 39; Fifield v. R. R. Co., 42 N. H. 445.

If a railroad company has discharged all the duties above laid down, it will be exempt from liability to its employees. If it fail in any of these, and an employee be injured in consequence, it must respond in damages. The following is an excellent summary of the law on this point, given by Bacon, J., in the case of Warner v. Erie R. R. Co. (supra):

"The true principle applicable here is, I think, that when the defendant has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skilful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury."

We have heretofore left untouched a very important element in this class of cases, viz.: the conduct of the employee. The duty of the company is in every case liable to be materially affected by this conduct. It will now, therefore, be taken into consideration.

It seems clear if a person in the employment of a railroad company discovers that the appliances with which he is working are or have become through use unsafe, and continues without any special order of the company, and without making any complaint, to use the said appliances, that he will be held to have either run the risk of being injured or to have been guilty of contributory negligence; and hence, in case of an injury to him occasioned by such defect, the company will not be held liable. And this is true even though the defect be such an one as under ordinary circumstances the company would be bound to repair. Woodley v. Metropolitan R. R. Co., L. R., 2 Exch. Div. 384; Kielly v. Belcher, etc., Mining Co., 3 Sawyer, 500; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Georgia R. R. Co. v. Kenney, 58 Ga. 485; Lumley v. Caswell, 47 Iowa, 159; Chicago R. R. Co. v. Munroe, 85 Ill. 25; Sullivan v. Louisville R. R. Co., 9 Bush. 81; Ladd v. New Bedford R. R. Co., 119 Mass. 412; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Hamathy v. Northern, etc., R. R. Co., 46 Md. 280; Ft. Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Crutchfield v. Richmond, etc., R. R. Co., 78 N. C. 300; Gilson v. Erie R. R. Co., 68 N. Y. 449; Oak Bridge Coal Co. v. Reed, 6 Cent. L. J. 275; Morris v. Gleason, 4 Ill. App. 395; Ford v. Ftitchburg R. R. Co., 110 Mass.; Mehan v. S. B. & N. Y. R. R. Co., 73 N. Y. 585; Mich. Central R. R. Co. v. Austin, 40 Mich.

It is also evident that if the employee of a company who has knowledge of defects in machinery or other appliances gives proper notice thereof and is promised that they shall be remedied, his subsequent use of them, in the well-grounded belief that they will be put in proper condition within a reasonable time, does not necessarily make them guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery and appliances after he knew of their defective or insufficient condition, he was in the exercise of due care. Hough v. United States, 100 U. S. 213; Conway v. Vulcan Iron Works, 62 Mo. 35; Patterson v. P. C. Ry. Co., 76 Pa. St. 389; LeClair v. First Div. of St. Paul and Pa. R. R. Co., 20 Minn. 9; Holmes v. Clark, 6 H. & N. 937. Of course, in coming to a conclusion on this point, the period of time during which the employee works with the machinery or appliance after giving notice of the defect therein is to be taken into account. If it be unreasonably protracted

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he will of course be precluded from recovery. If it be such a period as is reasonable to allow for the performance on the part of the company of their promise to repair he is not necessarily precluded. The question is for the jury. In ordinary cases, where the defect which causesthe accident is not owing to a neglect on the part of the company of any of the duties above laid down, and the employee has not himself detected the defect, he will be held to have assumed the risk of being injured by such a defect as one incidental to his employment, and cannot, therefore, recover. Summersell *v.* Fish, 117 Mass. 312; Hamathy *v.* N. Cent. R. R. Co., 46 Md. 280; O'Donnell *v.* Allegheny Valley R. R. Co., 59 Pa. St. 239; Moss *v.* Pacific R. R. Co., 49 Mo. 167; Grand Rapids and I. R. R. Co. *v.* Huntley, 38 Mich. 237; Indianapolis B. and W. R. Co. *v.* Tay, 91 Ill. 474; Conway *v.* Ill. Cent. R. R. Co., 50 Iowa 465; Holden *v.* Fitchburg R. R. Co., 129 Mass.; DeGraff *v.* N. Y. Cent. and H. R. R. R. Co., 76 N. Y. 125; Smith *v.* St. Louis, K. C. and N. R. Co., 69 Mo. 32; Pierce on R. R. 371.

The evidence adduced in the principal case left really but one question open for discussion; the rest were completely covered by the principles already laid down. The only open question was, What is the obligation of a railroad company to its employees in respect of rolling-stock belonging to another company? The case of Baldwin *v.* R. R. Co., 50 Iowa, 680, cited by the court in the majority opinion, seems to be a strong authority in favor of the conclusion reached by the court. In addition to the authorities cited on this point in the dissenting opinion, see Murch *v.* Concord R'y Corp., 9 Fost. (N. H.) 9; Jetter *v.* N. Y. Cent. and Hudson River R. R. Co., 2 Keyes, 154, both of which raised analogous questions as regards the duty of railroad companies to passengers Cf. notes to Michigan Cent. R. R. Co. *v.* Smithson, 1 Am. and Eng. R. R. Cas. 101, and Phila. and Reading R. R. Co. *v.* Schertle, 2 Am. and Eng. R. R. Cas. 158.

As to injuries to employees through defective or dangerous machinery, see Michigan Central R. R. Co. *v.* Smithson, 1 Am. and Eng. R. R. Cas. 101; Fuller *v.* Jewett, 1 Am. and Eng. R. R. Cas. 109; Walker *v.* Boston, etc., R. R. Co., 1 Am. and Eng. R. R. Cas. 141, Indianapolis, etc., R. R. Co. *v.* Estes; 1 Am. and Eng. R. R. Cas. 622; Cone *v.* Delaware, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 57; Henry *v.* Staten Island R. R. Co., 2 Am. and Eng. R. R. Cas. 60; Smith *v.* Potter, 2 Am. and Eng. R. R. Cas. 140; Walsh *v.* St. Paul, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 144; Flanagan *v.* Chicago, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 150; Phila., etc., R. R. Co. *v.* Schertle, 2 Am. and Eng. R. R. Cas. 159; Kain *v.* Smith, 2 Am. and Eng. R. R. Cas. 545.

As to injuries to employees through defects about the track or road-bed, see Central R. R. Co. *v.* Mitchell, 1 Am. and Eng. R. R. Cas. 145; Porter *v.* Hannibal, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 44; Holden. *v.* Fitchburg R. R. Co., 2 Am. and Eng. R. R. Cas. 94; Gates *v.* Southern Minnesota R. R. Co., 2 Am. and Eng. R. R. Cas. 236; Clark *v.* St. Paul, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 240; Wells *v.* Burlington, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 243; Hawley *v.* Northern, etc., R. R. Co., 2 Am. and Eng. R. R, Cas. 248.

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PITTSBURG AND CONNELLSVILLE R. R. Co.

v.

SENTMEYER.

(92 *Pennsylvania Reports*, 276. *January* 5, 1880.)

A servant or employee assumes the risk of all dangers in his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care.

The master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against; but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty.

Where an employer has furnished his employees with tools and appliances, which, though not the best possible to be obtained, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents.

NOVEMBER 22d, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON and TRUNKEY, JJ. STERRETT and GREEN, JJ., absent.

Error to the Court of Common Pleas of Fayette County: Of October and November Term, 1877, No. 289.

Case by Daniel Sentmeyer and Susan Sentmeyer, his wife, against the Pittsburg and Connellsville R. R. Co., to recover damages for the death of their son, alleged to have been killed by the negligence of defendants. The son of the plaintiffs, a young man about sixteen years old, was employed as a brakeman on a freight train of the defendant company. While thus employed, on the 26th of March, 1872, he was knocked or fell off the top of a freight car and was killed, under the following circumstances: A train of empty cars, coming from Brinton to the coke works below Connellsville, was divided into two sections, one running some time behind the other. Sentmeyer was flagman on the first section, and for some cause (which did not appear) was directed to get off and go back and flag the section which was behind. He did so, and when it started he got on the engine of this section to ride until he overtook his own train. This was some twenty miles below where the accident occurred. On this section he had nothing to do but to remain on the engine until he reached his own section. At the place he was killed there were coke ovens near the upper side of the railroad, from which had been built, many years before, a narrow bridge or gangway, running over the railroad, something over fifteen feet high, on which the ashes from the coke ovens were wheeled over to get them out of the way. Before the train

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came to this gangway, Sentmeyer left the engine on which he was, and passed upon and over the top of the cars, for some purpose unknown, and in passing under this gangway was knocked off and killed, and for the loss of his life under these circumstances his parents brought this suit. He had been in the employ of the company about a year.

On the trial the defendants having proved that the only place Sentmeyer had a right to be, on that section of the train, was on the engine, claimed that having left that place of his own accord, and gone where he had no business and had no right to be, the plaintiffs were not entitled to recover.

The following were among the points of plaintiffs, all of which the court affirmed.

1. That by entering defendant's service, George W. Sentmeyer assumed only the ordinary and reasonable risks incident to such service; and if the jury believe from the evidence that it was required of employees of the company, of the same class as Sentmeyer, and was usual and customary for them, to be on the top of freight and stock cars while in motion, and that defendant permitted a bridge to be erected and maintained over its track of a height insufficient to allow the safe passage of persons while on the top of such freight or stock cars, and that while on the top of such cars Sentmeyer was knocked off and killed, while in the service of the company, they may find that the death of Sentmeyer was caused by such negligence of the company as would make it liable to the plaintiffs in damages therefor.

3. That Sentmeyer had the right to assume that if the company required other employees of the same class to be on top of the freight cars while in motion, they could be there without being exposed to danger to their lives, and they may find that if he, while in the service of the company, went only where other employees of the same class were required to go habitually, and was killed while there by coming in collision with a bridge which the company allowed to be kept and maintained there of insufficient height to allow the safe passage of persons in such a place, he was not guilty of such contributory negligence as would relieve the company from responsibility for his death.

6. That before Sentmeyer can be fixed with contributory negligence it must have been shown that he was in fault in doing what he did; that he was not innocent but was incautious; and if the jury believe that he went only where other employees of the same class went and were required to go, and did no more than they did, they may find that he was not in fault nor incautious, but innocent.

7. That before the jury can find that Sentmeyer was guilty of contributory negligence by being out of his place, they must be satisfied from the evidence that there was a certain place for him

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by the rules of the company; and evidence that flagmen, taken up like he was, usually rode on the engine, and that his death occurred while he was in another place where other employees of the same class were required to be, is not of itself sufficient to charge him with contributory negligence.

8. That if Sentmeyer was out of his place, he is not chargeable with contributory negligence by reason thereof, unless he was guilty of actual negligence by being where he was.

The following were among the points submitted by defendants, with the answer of the court thereto:

6. That if the jury believe that George W. Sentmeyer was a flagman, and that his position as such was on the engine of the train or section on which he was at the time of the supposed accident, and that he left the engine and passed over the top of the cars, he left his position and was out of the line of his duty and it was at his own risk, and the accident was caused by his own negligence, and the plaintiffs cannot recover.

Ans. "Refused."

7. That the defendant corporation having had the bridge complained of in this case constructed of sufficient height, it is not liable to an employee for injury, when the sinking of the bridge, if any such there was, was not apparent, and of which it had no notice.

Ans. "Refused. We cannot say that the bridge was constructed of sufficient height; that is a question for the jury."

8. That George W. Sentmeyer, the deceased, having been in the employ of the defendant company for many months, running on the road as a brakeman, had every opportunity of informing himself of the position and height of this bridge, and danger arising therefrom was clearly incident to the labor he undertook to perform. Therefore the plaintiffs cannot recover.

Ans. "If the jury find that deceased had every opportunity of informing himself of the position and height of the bridge, then the point is affirmed; otherwise it is refused."

Verdict for plaintiffs for $2315.38, and after judgment defendants took this writ, assigning for error, inter alia, the answers to the above points.

D. Kaine and Wm. H. Coldren, for plaintiff in error.—An employee entering the service of any railroad company assumes all the risks incident to that business upon that particular line or road, and is presumed to inform himself of the location and permanent construction thereof. Devitt *v.* The Pacific R. R. Co., 3 American Railway Cases, 533. All the questions in the case at bar were ruled in this case.

The deceased clearly entered this employment and assumed this particular risk with knowledge thereof, and so remaining for many months had every opportunity of informing himself, and

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when he left the engine and passed over the roof of the cars he left his duty and was there as a stranger, and the risk was his own. Owen *v.* New York Central R. R. Co., 1 Lansing, 108.

C. E. Boyle, for defendants in error.—The deceased, when he entered the employment of the company, assumed only the ordinary and reasonable risks incident to said employment. Patterson *v.* P. and C. R. R. Co., 26 P. F. Smith, 389. The plaintiff's case was based on the charge that by permitting the bridge to be erected and maintained, as it did, the company was guilty of negligence—that it was not one of the risks that Sentmeyer assumed. This question was fairly and properly submitted to the jury; and they found it in favor of plaintiffs. Pennsylvania R. R. Co. *v.* Kilgore, 8 Casey, 292; Sh. and Redf. Neg., sec. 283.

The main question in the case was as to whether Sentmeyer had been guilty of contributory negligence. The burden of proving this was on the company. Beatty *v.* Gilmore, 4 Harris, 463; Canal Co. *v.* Bentley, 16 P. F. Smith, 30; C. and P. R. R. Co. *v.* Rowan, Id. 393.

In the case of Owen *v.* New York Central R. R. Co., 1 Lansing, 108, relied on by plaintiff in error, it appears "the brakeman entered into his employment with knowledge of the bridge's position and height, and had opportunity to learn of its continuance." So in Devitt *v.* Pacific R. R. Co., 3 Am. Railway Reports, 533 (Missouri), it appeared that the deceased "had been repeatedly warned to look out for this and other bridges." . . . "That he knew the danger of coming in contact with said bridge; that his attention had been called to the danger of injury from the lowness of bridges on his route, and that with this knowledge," etc.

GORDON, J.—Where a railroad company voluntarily subjects its employees to dangers which it ought to provide against, and an accident happens to an employee from a want of proper provision against such dangers, the company is undoubtedly liable. But, on the other hand, it is not liable for accidents happening from the ordinary risks and dangers of the business, for it is a legal presumption that the servant assumed the risk of such accidents when he entered the service of the company. Patterson *v.* R. R. Co., 26 P. F. Smith, 389. Again, we may further extend this rule by saying, that the servant, or employee, assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. Furthermore, the master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty. These principles govern this case. The bridge by which young Sentmeyer was killed was fifteen feet and six inches in height from the top of the railroad rails,

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whilst the height of the cars varied from nine to ten and one half feet; thus for the lower cars the bridge was sufficiently high, but for the higher ones, several inches too low. Sentmeyer had been, for several months previous to the accident, employed as flagman on one of the trains of this road, and therefore had, or ought to have had, knowledge of the height of the cars used upon it, and also of the height of this bridge. These were matters which addressed themselves to his own observation, and, as we have already said, for the prudent exercise of that observation he was responsible. But did he give such attention to the dangers to which he was exposed as an ordinarily prudent man should have given to them? Certainly not, or the accident would not have occurred. He had, almost every day for a month, passed and repassed under that bridge; he knew just where to look for it, and if he paid any attention to it whatever, he must have known that when standing at full length upon a car of medium height, say nine feet six inches, there was but an inch or two between the bridge and the top of his head. What shall we say, then, of that man's prudence who would thus risk his life on the difference of two or three inches in the height of a car? But the court below held the company rigidly to what it regarded as its duty in regard to the bridge, without any reference to the duty resting upon the deceased to give heed to a known and obvious danger and prudently to care for himself. "If," reads the plaintiffs' first point, "the jury believe from the evidence that it was required of the employees of the company, of the same class as Sentmeyer, and was usual and customary for them to be on the top of freight and stock cars whilst in motion, and the defendant permitted a bridge to be erected and maintained over its track of a height insufficient to allow the safe passage of persons while on the top of such freight or stock cars, and that while on the top of such cars Sentmeyer was knocked off and killed, while in the service of the company; they may find that the death of Sentmeyer was caused by such negligence of the company as would make it liable to the plaintiffs in damages therefor." This point was affirmed without qualification, and it amounts to an instruction that the defendant was bound to have all the bridges crossing its road of such a height that whether its employees were careful or negligent no damage could result to them therefrom.

But what is the logical result of a doctrine such as this? Is it not that the company must not only guard its servants from probable but also from possible dangers, and that it must place no dependence on their care and skill even in the matter of their own preservation and personal safety? That it must provide against their very negligence and become an insurer of their limbs and lives? We need not say this will not do; that neither natural nor artificial persons can bear a burden such as this, neither ought they

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so to do. When men are hired something must be predicated of their judgment and prudence, and hence, when the employer furnishes them with tools and appliances, which, though not the best possible, may, by ordinary care, be used without danger, he has discharged his duty and is not responsible for accidents.

But again: the defendant was liable for the consequences of such dangers as it subjected the employee to, and not for those to which he subjected himself. He was the flagman of the preceding train, and his only duty on the train from which he was killed was to ride upon it until he overtook his own train. His business was simply to take care of himself, and the whole duty of the company was discharged by affording him a safe place to ride. On that train there were two such places, the caboose and the locomotive; he might have taken either and been perfectly safe; he took neither, but chose the top of the cars, the place of all others the most unsafe. No duty to the company called him to this position; he chose it of his own free will; he put himself in the place of danger, and the direct consequence of this, his own voluntary act, was the loss of his life. For this, surely, the company was not liable, for it required of him no such risk. It furnished him with a safe conveyance, all it was at that time bound to do, and if he chose to turn that safe conveyance into one of danger it was no fault of the company.

As this disposes finally of the whole case, we will not dwell on any particular exceptions.

Judgment reversed.

The above case seems to be clearly ruled by the great current of authority. A host of cases might be cited to show that a master is bound to furnish his servants with reasonably safe machinery and implements with which to carry on their employment. He is not in any sense an insurer, but is by the nature of his position under an obligation not to expose his employees to any risks which can be reasonably avoided. The following are the latest American authorities to this effect:

Keegan *v.* W. R. Co., 8 N. Y. 175; Wright *v.* N. Y. Central, 25 N. Y. 562; Laning *v.* N. Y. Central R. Co., 49 N. Y. 521; Leonard *v.* Collins, 70 N. Y. 90; Roberts *v.* Smith, 2 H. and N. 213; Houston and T. R. Co. *v.* Oram, 49 Tex. 341; Breckman *v.* S. C. R. Co., 8 S. C. 73; Howd *v.* Miss. Cent. R. Co., 50 Miss. 178; Col. Cent. R. Co. *v.* Ogden, 3 Col. 499; Bessex *v.* Chicago and N. W. R. Co., 45 Wis. 477; Wedgewood *v.* Chicago and N. W. R. Co., 41 Wis. 478; S. C., 44 Wis. 44; Toledo W. and W. R. Co. *v.* Asbury, 84 Ill. 429; McMillan *v.* Union Press Buck Forks, 6 Mo. App. 434; Cooper *v.* Central Ry. Co., 44 Iowa, 134; Fifield *v.* Northern R. Co., 42 N. H. 225; Shanny *v.* Androscoggin Mills, 66 Me. 420; Hough *v.* Texas and P. R. Co., 100 U. S. 213; Harkins *v.* Standard Sugar Refinery, 122 Mass. 400; C. and P. R. Co. *v.* State 44 Md. 283; Lake Shore and M. S. R. Co. *v.* Fitzpatrick, 31 Ohio St. 479; Noyes *v.* Smith, 28 Vt. 29; De Forest *v.* Jewett, 19 Hun, 509; Brabbits *v.* Chicago, etc., R. R. Co., 38 Wis. 289; Toledo and R. R. Co. *v.* Conroy, 68 Ill. 560; Kidwell *v.* Houston and St. N. Ry. Co., 3 Woods C. Ct. 313; Cagney *v.* Hannibal and St. Joseph R. R. Co., 69 Mo. 416; Budges *v.* St. Louis, etc., R. R. Co., 6 Mo. App. 389; Chicago and Alton R. R. Co. *v.* Platt, 89 Ill. 141;

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East St. Louis Packing Co. v. Hightower, 92 Ill. 139; Chicago and Alton R. R. Co. v. Mahoney, 4 Ill. App. 262.

It is true that there are some authorities which would seem to hold the employer to a shorter measure of duty, imposing for instance upon a railroad company almost the same obligations with respect to its employees which it owes to the travelling public. Snow v. Housatonic Ry. Co., 8 Allen, 441; Chicago and N. W. Ry. Co. v. Sweet, 45 Ill. 197; Chicago and A. R. Co. v. Sullivan, 63 Ill. 293; Toledo, P. and W. R. Co. v. Conroy, 68 Ill. 560.

But these authorities are now usually considered to be overruled or of trifling weight.

On the other hand it is equally well settled that a servant who has had a fair opportunity to know and observe the character of the occupation in which he engages will be presumed to have assumed all reasonable risks incident thereto. Bruton v. R. R., L. R., 7 Exch. 130; Buzzell v. Mfg. Co., 48 Me. 121; Coombs v. New Bed Cord Co., 102 Mass. 586; Gibson v. R. R., 63 N. Y. 448; Mullen v. Steamboat Co., 78 Pa. St. 26; Muldowney v. R. R., 39 Iowa, 615; Howd v. R. R., 50 Miss. 178; Kelly v. Belcher, 3 Sawyer, 500; Columbus and X. R. Co. v. Webb, 12 Ohio St. 475; Columbus and I. C. R. Co. v. Arnold, 31 Ind. 174; Grand Rapids and I. R. Co. v. Huntley, 38 Mich. 237; Harrison v. Central R. R., 2 Vroom, 293; Indianapolis, B. and W. R. Co. v. Fay, 91 Ill. 474; Conway v. Ill. Cent. R. R. Co., 50 Iowa, 465; Mobile and O. R. Co. v. Thomas, 42 Ala. 672; Smith v. St. Louis, K. C. and N. R. Co., 69 Mo. 32; Porter v. H. and St. J. R. Co., 9 Reporter, 549; Steffen v. Chicago and N. W. R. Co., 46 Wis. 259; Graff v. N. Y. Cent. and H. R. R. Co., 76 N. Y. 125; Kelley v. Silver Spring Bleaching Co., 12 R. I. 112; Potts v. Pt. C., D. and R. Co., 2 L. T. (N. S.) 283; Webb v. Rennie, 4 Fost. and Fin. 608; Patterson v. R. R. Co., 76 Penn. St. 389.

This is usually a matter of law for the court. But where a question arises as to whether the servant knew of the risks incurred, or had reasonable reason to know of them, it is sometimes submitted to the jury. Huddleston v. Lowell Machine Shop, 106 Mass. 282; Northcote v. Batchelder, Id. 322; Porter v. R. R., 60 Mo. 160; Conroy v. Vulcan Iron Works, 62 Mo. 35; Dale v. R. R., 63 Mo. 455.

The principles already laid down seem directly applicable to the case in hand, and fully substantiate the decision of the court. A few cases have, however, occurred almost on all fours with the present one which remain to be considered.

In Owen v. N. Y. Cent. R. R. Co., 1 Lans. 108, the plaintiff was, as in this case, knocked off the top of the defendant company's cars while engaged in pursuing his avocation as a brakeman. The following extract from the opinion shows the facts of the case and the position taken by the court:

"The risk of injury by means of the passage of the train of cars under the bridge in question must be held to have been assumed by the plaintiff when he entered the defendant's service as a brakeman on the train. He had been in the defendant's employ in the same capacity and upon the same train for a year or more, at which time he had passed daily under this same bridge, which has been at its present height ever since the road was constructed. The danger was open and obvious, and within the plaintiff's personal knowledge. It was a danger clearly incident to the service he undertook to perform. . . . The law will imply that he assumed the risk of personal injury." To precisely the same effect is the case of Devitt v. Pacific R. R. Co., 3 Am. R. R. Repts. 533, where it appeared that the plaintiff "had been repeatedly warned to look out for this and the other bridges. . . . That he knew the danger of coming in contact with said bridge, and that his attention had been called to the danger of injury from the lowness of the bridges on the route."

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In line with these authorities is the case of the Baltimore and Ohio R. R. Co. v. Stricker, 51 Md. 47, where the plaintiff was injured in the same manner already described. The evidence there was that the plaintiff had been for some time in the defendant company's employ; that he had never heard of any one being struck by the bridge in question, although he had frequently passed under it; that he had never been warned that it was dangerously low, and that he supposed a man could pass under it standing erect upon the car top. Notwithstanding this testimony the court held that the plaintiff must be presumed to have known of the bridge's height, and to have assumed the risk of passing thereunder as incident to his employment. He was therefore held not to be entitled to recover.

The last-named case presents a peculiar feature which assimilates it still more closely to the principal case. It appeared that it did not come within the line of plaintiff's duty to be on the car top at the particular time the accident occurred. The company's measure of duty towards him was therefore materially diminished. In the principal case the same feature occurred, but in exaggerated shape, the plaintiff being at the time of the accident on a train where he was not employed, and where he should have remained quietly seated in the engine.

Plaintiff's inability to recover may perhaps be attributed to contributory negligence on his part, which is of course equally fatal to recovery by servant against master for negligence as in other cases. Illinois Cent. R. R. Co. v. Patterson, 93 Ill. 290; Penn. Co. v. Hankey, id. 580; and see the cases generally on the law of contributory negligence.

William L. Slater et al., Administrators, etc., Respondents,

v.

Hugh J. Jewett, as Receiver, etc., Appellant.

(84 *New York Reports*, 61. *April* 19, 1881.)

The measure of a master's duty to his servant is reasonable care, having relation to the parties, the business in which they are engaged, and the exigencies which require vigilance and attention; he is not a guarantor of the safety of his servant.

The fact that one employee upon a railroad is hired and discharged by one superior agent and another by another does not affect the relation of the employees to each other as fellow-servants.

A company or individual operating a railroad has the right, as regards employees, to vary from the regular time-table in the running of trains; all that is required is due care and diligence in giving notice of the change and in running the train upon the changed time.

It is not required that the master should see to it personally that notice of such a change comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent persons to receive and transmit the necessary orders, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. The duty of the master is performed when he provides beforehand and makes known to his servants rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one entitled to it.

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Where regulations for the running of trains out of time, proper and suitable, with a view to the safety of employees, are prescribed, obedience to these regulations by those having charge of a train is matter of executive detail; for a disobedience of them, which causes injury to a co-employee, the master is not liable.

It seems that the courts may take judicial notice of the way in which the great railways are managed in the every-day practical running of them, i.e., by overlooking officers at distant places, who by means of the telegraph are advised where trains are, and direct their movements.

S., plaintiffs' intestate, was a fireman upon a train running upon a railroad operated by defendant as receiver. He was killed by a collision between his train and another. It was the custom, and was prescribed by the general regulations for the running of trains on said road, that when trains were behind time they should be moved in accordance with special telegraphic orders from the train dispatcher, to be communicated by the telegraph operators receiving them to the conductor and engineer of the train, in the presence of each other. An order was so sent directing where the train which collided with the train upon which S. was should meet the latter. The operator communicated it to the conductor, but not to the engineer; the conductor, without the authority or assent of the engineer, signed the name of the latter in acknowledgment of receipt of the order, and the train dispatcher was advised that the order had been correctly delivered. The conductor forgot to deliver the order to the engineer, who, in ignorance of it, instead of waiting at the station designated until the other train came up, proceeded with his train and the collision occurred. In an action to recover damages there was no evidence but that the operator and conductor were competent and skilful when employed. It did appear that defendant's rules and regulations were well devised for safety, and had been in use for a number of years without occasioning any accident. *Held*, that the negligence was that of fellow-servants of the intestate in the same common employment, for which defendant was not liable.

Flike *v.* B. and A. R. R. Co. (53 N. Y. 549), Fuller *v.* Jewett (80 id. 46), Crispin *v.* Babbitt (81 id. 516), distinguished.

(Argued January 22, 1881; decided April 19, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of plaintiffs, entered upon an order made January 6, 1880, denying a motion for a new trial and directing judgment on a verdict.

The nature of the action and the material facts are stated in the opinion.

John G. Milburn, for appellant: A master is bound to use ordinary and reasonable care in the selection of competent servants, in furnishing them with suitable means and appliances necessary in the business, and in providing proper rules and regulations for the conduct of the business where such are necessary. (Wright *v.* N. Y. C. R. R. Co., 25 N. Y. 562; Shearman & Redfield on Negligence, §§ 90, 92, 93.) A master is always liable for negligence in respect to such acts and duties as he is required to perform and discharge as master, without regard to the rank or title of the agent intrusted with their performance. (Laning *v.* N. Y. C. R. R. Co., 49 N. Y. 521; Flike *v.* Boston R. R. Co., 53 id. 549, 553; Crispen *v.* Babbitt [Ct. of Appeals, Sept. 21, 1880], 10 N. Y.

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Weekly Dig. 512.) The term "fellow-servant" includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. (Wood on Master and Servant, § 435; Farwell v. B. & W. R. R. Co., 4 Metc. 49; Coons v. S. & W. R. R. Co., 6 Barb. 231; S. C., 1 Seld. 492; Sherman v. R. & S. Ry. Co., 17 N. Y. 153; Boldt v. N. Y. C. R. R. Co., 18 id. 432; Wright v. N. Y. C. R. R. Co., 25 id. 562; Laning v. N. Y. C. R. R. Co., 49 id. 521; Sammon v. N. Y. & Harlem R. R. Co., 52 id. 251; Malone v. Hathaway, 64 id. 5; Besel v. N. Y. C. & H. R. R. R. Co., 70 id. 171; Salters v. D. & H. C. Co., 3 Hun, 338; Moran v. N. Y. C. & H. R. R. R. Co., 3 N. Y. S. C. [T. & C.] 770; Ross v. N. Y. C. & H. R. R. R. Co., 5 Hun, 488; 2 Thompson on Negligence, 1034, 1037.) The exemption of the master extends to all who are fellow-servants, and not simply to those who are fellow-servants in the same department of duty. (Farwell v. B. & W. R. R. Co., 4 Metc. 49; Coon v. Syracuse & U. R. R. Co., 1 Seld. 492; Flike v. B. & A. R. R. Co., 53 N. Y. 549, 553; Boldt v. N. Y. C. R. R. Co., 18 id. 432, 433; Russell v. Hudson Riv. R. R. Co., 17 id. 134; Wright v. N. Y. C., 25 id. 562, 565; Laning v. N. Y. C., 49 id. 521, 528; Sherman v. R. & S. Ry. Co., 17 id. 153; Hofnagle v. N. Y. C., 55 id. 608; Malone v. Hathaway, 64 id. 5; Lehigh Valley Co. v. Jones, 86 Penn. St. 432; Henry v. Staten Island R. R. Co., 10 N. Y. Weekly Dig. 430; Seaver v. Boston R. R. Co., 14 Gray, 466; Gilshannon v. R. R. Co., 10 Cush. 228; Tunney v. R. R. Co., L. R., 1 C. P. D. 291; Sammon v. N. Y. & H. R. R. Co., 62 N. Y. 251; Besel v. N. Y. C. & H. R. R. Co., 70 id. 171; Gilman v. R. R. Co., 10 Allen, 235; Salters v. B. & A. R. R. Co., 3 Hun, 388; Moran v. N. Y. & H. R. R. Co., 3 N. Y. S. C. [T. & C.] 770; Hughes v. R. R. Co., 49 Miss. 256; Hutchinson v. R. R. Co., 5 Exch. 343; Sherman v. R. & S. Ry. Co., 17 N. Y. 153; 2 Thompson on Negligence, 1038; Chapman v. Erie Railway Co., 55 N. Y. 579.) The negligence of Mead and McDonald was not within the limitation or exception which excludes from the operation of the rule the negligence of a servant when he is acting in the place and stead of the master. (Wood on Master and Servant, §§ 438, 448, 449; Laning v. N. Y. C. & H. R. R. R. Co., 49 N. Y. 521; Brickner v. N. Y. C. & H. R. R. R. Co., 2 Lans. 506; Flike v. B. & A. R. R. Co., 53 N. Y. 549; Hofnagle v. N. Y. C. & H. R. R. R. Co., 55 id. 608; Rose v. B. & A. R. R. Co., 58 id. 217; Malone v. Hathaway, 64 id. 5; Besel v. N. Y. C. & H. R. R. R. Co., 70 id. 171; Crispin v. Babbitt, 10 N. Y. Weekly Dig. 512; Wright v. N. Y. C. R. R. Co., 25 N. Y. 568.) The court erred in its charge to the jury that whatever acts the agents appointed by the defendant do are in law the acts of the defendant. (Farwell v. B. & W. R. R. Co., 4 Metc. 49; Coon

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v. S. & U. R. R. Co., 6 Barb. 231, 237; Flike v. B. & A. R. R. Co., 53 N. Y. 549, 552; Leonard v. Collins, 70 id. 90; Chapman v. Erie Ry. Co., 55 id. 579.) The duty of the master to his servant is only to exercise ordinary care. (Leonard v. Collins, 70 N. Y. 90; Warner v. Erie Ry. Co., 39 id. 468.) It is presumed that the master has performed his duty; negligence in hiring or retaining must be proved. The burden is on the plaintiff to establish negligence in this regard. (Wood on Master and Servant, §§ 419, 420; Chapman v. Erie Ry. Co., 55 N. Y. 579; Baulec v. N. Y. C. & H. R. R. R. Co., 59 id. 356.)

James F. Gluck, for respondent. The plaintiff's intestate was himself entirely free from negligence. (Wood's Master and Servant, 779.) When employed by the master to communicate to servants an order of the master changing the time-table given those servants previously by the master, the telegraph operator was not a co-employee of the engineer, nor of the fireman, plaintiff's intestate. (Laning v. N. Y. C. R. R. Co., 49 N. Y. 528; Flike v. The N. Y. C. R. R. Co., 53 id. 549; Hofnagle v. N. Y. C., 55 id. 608; Rose v. B. & A. Ry. Co. [Ct. of App.], 9 Am. Ry. Rep. 515; Buckner v. N. Y. C. R. R. Co., 2 Lans. 506; Laning v. N. Y. C., 49 N. Y. 672; Wilson v. Murray, 1 Sc. App. 326; 16 Am. Rep. 496, 497.) The superintendent, assistant superintendent and his assistants are officers and not servants. (Chicago, B. & Q. R. R. Co. v. McLallen, Adm'r, 84 Ill. 109; Am. Ry. Rep. 425; Washburn v. R. R. Co., 3 Head [Tenn.], 638; Railroad Co. v. Fort, 17 Wall. [U. S.] 558, 559; Siegel v. Schantz, 2 T. & C. [N. Y.] 353; Master and Servant, p. 769; Le Barron v. East Boston Ferry Co., 11 Mass. 312; Wood's Master and Servant, 905; R. R. Co. v. Keary, 3 Ohio St. 201; Rose v. B. & A. R. R. Co., 58 N. Y. 221; 17 Wall. [U. S.] 558, 559.) Assuming that the operator and the fireman were co-employes, it became a question for the jury to determine whether or not the risk in question was one assumed by the employee in his implied contract with the defendant. (Wharton on Negligence, 197, § 217; Shearman & Redfield on Negligence [3d ed.], § 103; Wood on Master and Servant, 713, 714; Laning v. N. Y. C. R. R. Co., 49 N. Y. 527; Union Pacific v. Melliken, 8 Kans. 647; 5 Am. Ry. Rep. 416.) The rule which holds the master not liable for injuries sustained by an employee at the hands of a co-employee does not here apply, and the further extension of the rule to a new application is against public policy and the tendency of judicial opinion. (Pierce's Am. Ry. Law, 289; Shearman & Redfield on Negligence [3d ed.], 114, §§ 96, 102, 105; Flike v. N. Y. C. R. R. Co., 53 N. Y. 556.)

FOLGER, Ch. J.—This action is brought by the plaintiffs as administrators, to recover damages for the death of Adelbert D. Slater, their intestate. The cause of his death was the collision of two engines, each drawing a train on the Erie railway operated by

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the defendant as receiver. It is claimed that the collision happened from negligence, chargeable to the defendant, though not proceeding immediately from him. The intestate was in the service of the defendant, as a fireman on one of the engines that came together. The immediate negligence that caused the accident and the death was that of the conductor on the train meeting that on which the intestate was serving, co-operating with that of a telegraphic operator at Salamanca, a station on the defendant's road. The latter having omitted to give to the engineer the orders received from the train dispatcher as to the place where the two trains should meet, which his instructions required him to do, and having reported a performance of his duty, and the former having signed the engineer's name, without his knowledge, to an acknowledgment and receipt of order, and then having failed to communicate the order to him; in consequence of which the engineer went on with his train, instead of waiting at the station designated until the other train came up.

The complaint avers, that it was the duty of the defendant to employ competent, trustworthy and skilful men, and to make proper regulations for the running of his trains so as to insure the safety of persons operating the same, and to provide, as far as practicable, against accident and injury to them in their employment, and in the performance of their service for him. This averment correctly states the duty of the defendant, unless it overstates it, when it sets his duty at so high a mark, as that of an insurer of the safety of his servants. The measure of the master's duty to his servant is reasonable care, having relation to the parties, to the business in which they are engaged, and the exigencies which require vigilance and attention, and conforming to the circumstances in which it is to be exerted. We agree that the defendant was bound to do all else that the averment puts upon him, unless it is read as making him a guarantor of the safety of his servants. The complaint avers that the defendant failed to employ proper and competent persons to manage and run his trains, and proper and suitable persons to give orders and information in respect thereto and properly to communicate the same to engineers and conductors of trains; and that he failed to make and enforce proper and reasonable rules and regulations for the running of his trains. The proofs of the plaintiffs did not seek to introduce into the case any other element of lack of duty in the defendant than these thus averred. And we think that the case is clear upon the proofs, that the defendant made no failure of duty, unless it was in the enforcement of the rules and regulations made by him for the running of his trains. Whether he failed in that is, we think, a question of law properly brought up by some of the exceptions taken at circuit by the defendant. It is not to be questioned that the telegraph operator and the conductor of the train were negli-

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gent, and that, from their careless omission of duty and disobedience of rules, the accident resulted. The rules that had been given to them for their guidance had been prepared with great care, were minute, explicit and plain, and exceedingly well devised for safety. They had been in operation for several years before the disaster, and no accident had ever taken place in the use of them. The train-dispatcher, who, concededly, was in the place of the defendant, had strictly observed these rules in this instance, and had received all the assurance needful and required by them, that they had been observed by all concerned.

Some contention was made on the argument, that there was no proof that it was not an exceptional and unprecedented thing to interfere, as was done in this instance, with the moving of the two trains, and that no cause was shown for an interference with them. The case shows clearly that it was the usage of the defendant and his predecessor, The Erie R. Co., to govern and direct the movement of trains by such order, and that there was reason for it in this instance. The order given was a special one, by reason of delay; but by special is not to be understood unusual and unprovided for. For nine years these rules had been in operation, and the witness who testifies to that, so applies his words as to plainly indicate that they had been in use in giving like directions to engineers and conductors on like occasions of delay. The proof shows that the time-card is the general order, and it comes from the superintendent. An order varying it on a special occasion comes from the train-dispatcher. The special order is as much provided for by the general regulations as the general time-card or other general rules. It is the conductor's duty to obey the special order, which supersedes, for the particular train, the general order. A special order to stop at a station having been received there is no right to go beyond that station until further direction. The rules proven and set forth in the case recognize the usage to stop and move trains by special order varying for the nonce the general time-card. Indeed, as we may take judicial notice of the way in which banks and like public institutions do business (Agawam Bank *v.* Strever, 18 N. Y. 502), so may we, that the great railways of the land are managed in the every-day practical running of them by overlooking officers at distant places, who use the telegraph wires to keep all the while informed where trains are, and to direct their movements from hour to hour. We have presented to us in this case, then, general regulations well calculated to insure safety in the running of the trains; a usage well understood, and provided for in these general regulations, to vary some particulars of these general rules on special occasions by special orders; specific, well-devised and promulgated rules for the mode of doing so with safety; an occasion arising for the giving of a special order to these two trains; a complete observance of

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all these regulations, by an officer who was in the stead of the defendant; an assurance to him that they had been observed by others; and the use by him, to bring his special order to the mind of the agent in charge of the trains, of the customary means that had been safe and efficient for a series of years. We need not say that there was no fault in the higher officers of the defendant, for it is the law of the case, given to the jury by the trial court, that there was not. The personal failure of duty was in the telegraph operator and the conductor.

Each of those agents, in doing their ordinary work for the defendant, were fellow-servants of the intestate, in the same common employment. The conductor was engaged in the particular work in which the intestate was—that of moving trains. The telegrapher was engaged in a work closely connected therewith—that of receiving and giving information of the whereabouts of trains and communicating orders to those controlling them for stopping or going on. This was a branch of the general business of the defendant essential to the smooth and successful movement of the whole—that branch of it in which the intestate was engaged as much as any other. No question seems to have been made on the trial but that the operator and conductor were competent and skilful when the defendant took them into his employ. It cannot be contended that there was anything required of the conductor that raised him out of his relation to the intestate of a fellow-servant. The act required of the conductor, at the particular time, was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. It is contended that the duty of the telegrapher at the time and the act required of him were those that the defendant was bound to perform as master, and that the negligent performance by the operator was the negligence of the master.

The argument to sustain this position consists, in part, in an effort to show that the duties of the operator were in no respect like to those of the intestate. They were not like, but they tended to the same end,—that of the speedy, efficient and successful carriage of passengers and freight over the railway. There are many kinds of servants of a great railway company. Their duties are not in all cases the same, nor always like, yet they are all done to bring one result, and it is their conjoint simultaneous and harmonious performance that does effect the finality, sought through the whole complex organism. If it be so that this operator sometimes received and sent messages that had naught to do therewith, still, on this occasion, the act required of him had direct connection with the acts of those engaged in moving the two trains. The position, that the operator was hired and discharged by one superior agent, and the intestate by another, and that, therefore,

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they were not fellow-servants, is not sound. The general authority to hire and to turn away was in the defendant. It did radiate from him through different chiefs of department in his general work. His, however, was the ultimate power. The heads of bureaus were not independent contractors, doing a branch of his work on their own responsibility, and free from his interference with their subordinates. He had the right to step into their spheres of duty and act for himself.

There is more plausibility in the position, that the act that was to be done on this occasion was so essentially one for the master to do in his duty to his servants, that whatever subordinate was taken by him to do it, came to be the master in doing it. It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to peform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and that, therefore, whoever he uses to bring those time-tables to the notice of his servants, he puts that person in his place to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done and done effectually; and that if, instead of doing it in person, he chooses to do it through an agent, that agent, pro hac vice, is he the master, and he the master is responsible for a negligent act therein of that agent whereby a fellow-servant of him is harmed. The rule has been laid down in repeated cases in this court, in terms so broad as to come close to this case. (Flike *v.* B. and A. R. R. Co., 53 N. Y. 549; Fuller *v.* Jewett, 80 id. 46; Crispin *v.* Babbitt, 81 id. 516.) Attentive consideration, however, will perceive a distinction between the cases. That the master has the right, as regards his servants, to vary from the time-table that he has set cannot be doubted. It is at times a necessity so to do, and a necessity so frequent as to fall within the occurrences that a railway servant is bound to expect in the course of his employment. Even as regards the public and passengers, a railway manager has a right, when needs press, to vary from his general time-table. All that can then be required from him by the public and passengers is that when he makes the variation he acts under it with reasonable care and diligence (Sears *v.* East. R. R. Co., 14 Allen, 433; Gordon *v.* M. and L. R. R. Co., 52 N. H. 596.) That is to say, due care and diligence in giving notice of the change, and in running the train upon the changed time. A servant cannot ask for or expect more than this. In Rose *v.* Boston and Albany R. R. Co. (58 N. Y. 217), while recognizing the rule as laid down in Flike's Case

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(supra), it was said: "It may be conceded that it is the duty of railroad corporations to prescribe, either by means of time-tables or by other suitable means, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains; such obedience is matter of executive detail, which, in the nature of things, no corporation or any general agent of it can personally oversee, and as to which employees must be relied upon." These views seem applicable to this case. The argument for the plaintiff's position, as we have stated it above, breaks just at the part where to be successful it ought to be the strongest. It is not true that, on an occasion like this, it is the duty of the master, or a part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time-table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. Such a variation, and the giving notice of it, is not like the supply of suitable and safe machinery, or of competent and skilled fellow-workmen. It is the act of an hour or of an instant, which for any useful effect to be got from it must be done at the instant, and that, too, from a distance. It is, from its nature and need, looked for as such. Of necessity it must be done through the best means of communication that experience, the safe and successful use of years, has demonstrated it to be prudent to employ. The act of supplying machinery or fellow-servants is one for which time may be taken and deliberation had, and it may be learned before hazard is run whether the effort at supply has been well made and is sufficient. So, in Flike's Case (supra), it was easy to know before the train was started that the brakeman detailed for duty had failed to be at his place. And in Fuller's Case (supra), that the engine sent to the shop for repairs was still faulty, before it was put on the road again. Hence, it was not one of the risks of the service that the fireman in one of those cases, and the engineer in the other, took upon himself that the brakeman did over-sleep, or that the boiler did explode. From the nature of things, communication, on these special occasions of which we are speaking, must be had through intermediate agents, with no or but little opportunity of testing their immediate fidelity

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or accuracy. Would it do to lay down a rule that, when the master has chosen those agents with due care and diligence as to their skill and competency, he must further take the responsibility to his other servants that the agents thus selected will never lapse into carelessness? The alternative is, that he must in person put into the hands of each conductor and each engine-driver the general time-table and every deviation from it, or abandon the mode of supervising and directing the movement of his trains by means of telegraphic communication. The reasonable rule in such case hath this extent, and no more, that he must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication according to prescribed general rules and regulations devised from the best experience in such business, and if among those means is the service of a fellow-servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service. The liability of the master to his servant arises from his duty to him or his contract with him. Expressed in general terms, that duty or contract is to supply the servant with suitable and safe machinery and appliances, with competent and skilful co-workers, and to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run and for any extraordinary occasions that may be reasonably anticipated. It is not seriously contested but that all these things were done by the defendant. We think that it is a misconception of the case, to hold that the order of the train-dispatcher was a change of the rules of the road, as established and promulgated by the superintendent. The train-dispatcher acted in exact accord with the general rules and regulations which foresaw and with minuteness provided for such an occasion as this, as much and as fully, so far as we can see from the case, as for the ordinary running of trains on the general time-card. The order of the train-dispatcher was but a carrying out of those rules, and an application of certain provisions of them to a case for which they were made, and the arising of which had been foreseen as probable. In what other way could they be carried out in the detail of them, but through the service of servants previously chosen and assigned to their parts? And can it with propriety be said that the parts of that detail are acts of the master, that he must do himself, or be liable for their negligent doing? The liability of the master is then made to depend upon the character of the act in the performance or non-performance of which the injury arises. If the act is one pertaining to the duty which the master owes to his servants, he is responsible to them for the manner of the performance of it. If it is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for the improper performance of it. (Crispin *v.* Babbitt, supra.)

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The query then is, in the case before us, Is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table, or is his duty done when he has beforehand provided rules, minute, explicit and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to every one entitled to it? We think that in the circumstances of this case the latter clause of the query propounds the true rule, and should be answered affirmatively. It is the duty of the master to provide rules and regulations for the running of the trains. He has done so here. One of them is, that by telegraphic message, sent at any time through operators at the ends of the wires, to the conductor and engineer of a train, that train may be stopped at a station, or hurried forward to another, or made to go out of general order. These rules with that provision are made known to all servants. If, when the intestate entered the employment of the defendant, these rules had been read to him and his especial attention called to this one, and he had agreed to serve under it, would not he have taken the risk of the carelessness of the operators and conductor in carrying it out? Is this case any different in substance from that? Really, by entering the employment with these rules in force, he did in effect agree that special orders might be so sent. The bargain between him and the defendant was not only that special orders might be given interfering with the general time-table, but that they might be given in this way. It is this feature of the case that distinguished it from some of those that we have cited.

The case was not given to the jury on this theory. It was, in the words of the learned counsel for the plaintiff, submitted to them on the theory that "the act of the operator was the act of the master."

This we think was an error that calls for a reversal of the judgment and a new trial.

All concur, except DANFORTH and FINCH, JJ., dissenting.

Judgment reversed.

In the note to the case of Ballou Adm'x, v. Chicago and N. W. Ry. Co., infra, the duty of railroad companies to provide for their employees safe and suitable machinery and appliances was considered. In the present case, two other branches o fduty on the part of railroad companies to their employees will be considered.

1. The duty to exercise due care and diligence in the selection of careful and trustworthy co-employees. 2. The duty to establish proper rules and regulations for the running of trains, so as to avoid, as far as possible, injuries to employees.

These will be considered in turn.

1. It is the duty of railroad companies to their employees to exercise due and reasonable care in the selection of careful, responsible and trustworthy co-employees. They must, on engaging a man, make reasonable investigation

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into his character, skill, and habits of life. If they do not do this, they will be held liable for an injury to another employee occasioned either by his negligence, incapacity or intemperance. Baulet v. N. Y. and H. R. Co., 59 N. Y. 326; Booth v. Boston and A. R. Co., 73 N. Y. 38; Union Pac. R. R. Co. v. Young, 19 Kans. 488; Cooper v. Mil. and P. R. R. Co., 23 Wis. 668; Mobile and M. R. Co. v. Smith, 59 Ala. 245; Tyson v. South. and N. A. R. R. Co., 61 Ala. 554; Mich. Cent. R. R. Co. v. Dolan, 32 Mich. 510; Harper v. Indianapolis and St. Louis R. R. Co., 44 Mo. 488; Howd v. Miss. Cent. R. R. Co., 50 Miss. 178; Blake v. Me. Cent. R. R. Co., 70 Me. 60; Jordan v. Wells, 3 Woods, 527; Gurney Mining Co. v. Kitts, 9 Rep. 86; Columbus, etc., R. R. Co. v. Troesch, 68 Ill. 545.

If they do, however, make such proper and reasonable investigation, they have fully discharged their duty. Mere negligence of a co-employee affords no ground for an action against the company. The following are among the latest cases upon this point. Woodley v. Metropolitan R. R. Co., 2 Exch. Div. 384; Dillon v. Union Pac. R. R. Co., 3 Dill. 319; Ala., etc., R. Co. v. Waller, 48 Ala. 459; McLean v. Blue Point Mining Co., 51 Cal. 255; Colorado, etc., R. Co. v. Ogden, 3 Col. 499; Burke v. Norwich R. Co., 34 Conn. 475; Shields v. Yonge, 15 Ga. 349; Fairbank v. Haentzsche, 73 Ill. 236; Sullivan v. Toledo, etc., Ry. Co., 58 Ind. 26; Dow v. Kansas, etc., Ry. Co., 8 Kan. 642; Louisville, etc., Ry. Co. v. Caven's Adm'rs, 9 Bush, 559; Beaulieu v. Portland Ry. Co., 48 Me. 291; Hamathy v. Northern Central Ry. Co., 46 Md. 280; Smith v. Lowell Mfg. Co., 124 Mass. 114; Chicago, etc., R. R. Co. v. Bayfield, 37 Mich. 205; Foster v. Minnesota R. R. Co., 14 Minn. 360; Memphis, etc., Ry. Co. v. Thomas, 51 Miss. 639; Marshall v. Schricker, 63 Mo. 308; McAndrews v. Burns, 39 N. J. L. 118; Sammon v. N. Y., etc., R. R. Co., 62 N. Y. 251; Hardy v. Carolina, etc., R. R. Co., 76 N. C. 5; Murray v. S. C. R. R. Co., 1 McMull. 385; Ohio and Miss. R. R. v. Colbarn, 8 Cent. L. J. 12; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Robinson v. Houston, etc., R. R. Co., 46 Tex. 540; Hard v. Vermont R. R. Co., 32 Vt. 472; Brabbits v. Chicago, etc., Ry. Co., 38 Wis. 289.

It is not proposed to comment upon a principle so generally recognized and assented to as that above laid down. Whatever objections may be raised to it, and there have been many, it is still generally admitted to be sound law. A few remarks, however, with reference to certain niceties and refinements upon the doctrine may not be out of place.

Attempts have often been made, as in the principal case, to avoid the effect of the rule by contending that the person whose negligence has caused the injury was not properly a co-employee of the injured person, but that he was rather to be viewed in the light of an agent or vice-principal of the company. If this can be established, the liability of the company is, of course, fixed.

It is somewhat difficult to make a clear statement of the law upon this point. A mere difference in the grade of employment has been generally considered as insufficient to establish the fact that two persons are not co-employees. McGowan v. St. Louis, etc., Ry. Co., 61 Mo. 528; Daubert v. Pickell, 4 Mo. App. 490; Cumberland Coal and Iron Co. v. Scally, 27 Md. 589; O'Conner v. Roberts, 120 Mass. 227; McLean v. Blue Point M. Co., 51 Cal. 255; Allen v. New Gas Co., L. R., 1 Exch. Div. 251; Lehigh Coal Co. v. Jones, 86 Pa. St. 432; Lawler v. Androscoggin R. R. Co., 62 Me. 463; Wilson v. Merry, L. R., 2 Q. B. 33; Schauck v. Northern Ry. Co., 25 Md. 462; Marshall v. Shricker, 63 Mo. 308; Summersell v. Fish, 117 Mass. 312; Weger v. Penna. R. R. Co., 55 Pa. St. 460; Hofnagle v. N. Y., etc., Ry. Co., 55 N. Y. 608. Although some courts, noticeably those of Ohio, hold to a contrary opinion. Berea Stone Co. v. Kraft, 31 Ohio St. 287; Louisville R. R. Co. v. Collins, 2 Dew. 114; Railroad Co. v. Fort, 17 Wall. 553; Mann v. Oriental Print Works, 11 R. I. 152; Cook v. Hannibal, etc., Ry. Co., 63 Mo. 397; Nashville, etc., Ry. Co. v. Jones, 9 Heisk. 27.

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If, however, a company places the entire charge of its business or of a distinct branch of it in the hands of an agent, exercising no discretion and no oversight over that business or that branch, such an agent is not properly to be considered as a co-employee of his subordinate. Mullen v. Phila. and Southern Steamship Co., 28 Sm. 25; Gormley v. Vulcan Iron Works, 61 Mo. 402; Malone v. Hathaway, 64 N. Y. 5. In order to determine the position of such an agent, the test is often applied as to whether or not he has power to discharge and employ his subordinates. If he has such power this is conclusive, or nearly so, that they are not his co-employees. Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521; Hofnagle v. N. Y. Cent. R. R. Co., 55 N. Y. 608; Huntingdon and Broad Top R. and C. Co. v. Decker, 82 Pa. St. 119; S. C., 84 Pa. St. 419; Kan. Pac. R. R. Co. v. Salmon, 11 Kan. 83; Cumberland and P. R. Co. v. State, 44 Ind. 283; Washburn v. Nashville and C. R. Co., 3 Head. 638; Cook v. Hannibal and St. Joe R. R. Co., 397; Deppe v. Chic., R. I. and P. Ry. Co., 38 Iowa, 592; Louisville and Nashville R. R. Co. v. Bowler, 9 Heisk. 866; Mobile and M. Ry. Co. v. Smith, 59 Ala. 245; Zeigler v. Day, 123 Mass. 152; Wilson v. Merry, L. R., 1 H. L. (Sc.) 326; Flike v. B. and A. R. R. Co., 53 N. Y. 551; Booth v. B. and A. R. R. Co., 73 N. Y. 38. Directors of a railroad company are in no case held to be co-employees with persons hired by the company to conduct its business. Fifield v. Northern Ry. Co., 42 N. H. 225; Columbus and I. C. Ry. Co. v. Arnold, 31 Ind. 174.

Another distinction which it is important to observe is that in order to constitute persons co-employees, it is essential that they be engaged in the same general business or enterprise, and be under one executive management. This is clear from the general run of the authorities. Ohio, etc., R. R. Co. v. Hammersley, 28 Ind. 371; Ryan v. Chicago and N. W. R. R. Co., 60 Ill. 171; Toledo, etc., Ry. Co. v. Moore, 67 Ill. 217; Cooper v. Mullens, 30 Ga. 146; Donaldson v. Miss., etc, R. R. Co., 18 Iowa, 286; Hogan v. Pacific R. R. Co., 49 Cal. 129; O'Donnell v. R. R. Co., 59 Pa. St. 239; Chicago, etc., Ry. Co. v. Keefe, 47 Ill. 110; Chicago and N. W. Ry. Co. v. Moranda, 93 Ill. 302; Chicago and N. W. Ry. Co. v. Scheuing, 4 Ill. App. 533; North Chicago Rolling Mills v. Monka, id. 664; Holton v. Daly, id. 25.

The great difficulty in the application of this rule is to discover what shall properly be considered the same general business, and what the same executive management. In this respect the courts differ very widely. It is impossible here to go into this very extensive and elaborate branch of the law at length. For a full consideration of the point the reader is referred to Mr. Wood's Treatise on the Law of Master and Servant.

In the following cases persons employed in different capacities by railroad companies were held to be co-employees:

Hutchinson v. York, etc., R. Co., 5 Exch. 343; O'Connell v. Balt., etc., R. R. Co., 20 Md. 212; Ragsdale v. Memphis, etc., R. R. Co., 59 Tenn. 426; Evans v. Atlantic, etc., R. R. Co., 62 Mo. 49; St. Louis, etc., R. Co. v. Britz, 72 Ill. 256; Summerhays v. Kansas Pac. R. Co., 2 Col. 284; Wilson v. Madison, 18 Ind. 226; Chicago, etc., R. R. Co. v. Memphis, 85 Ill. 500; Valtez v. Ohio, etc., R. R. Co., 85 Ill. 500; Dow v. Kansas Pac. R. R. Co., 8 Kans. 642; Morgan v. Vale of Neath R. R. Co., L. R., Q. B. 149; St. Louis, etc., R. Co. v. Britz, 72 Ill. 256; Manville v. Cleveland and Ohio R. R. Co., 11 Ohio St. 417; Seaver v. Boston R. R. Co., 14 Gray, 466.

2. It is the duty of a railroad company to use ordinary care and prudence in making and publishing to its employees sufficient and necessary rules for the safe running of its trains, and for the government of its employees, so as to furnish them a reasonable degree of safety, taking into consideration the nature and character of their employment.

Pittsburg, Ft. W. and C. R. Co. v. Powers, 74 Ill. 341; Chicago, B. and Q. R. Co. v. McLallen, 84 Ill. 109; Kansas Pac. R. Co. v. Salmon, 14 Kans. 512; Wright v. N. Y. Cent. R. R. Co., 25 N. Y. 562; Rose v. Boston and Alb. R.

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R., 58 N. Y. 217; Besel v. N. Y. Cent. and Hudson River R. R. Co., 70 N. Y. 191; Balt. and Ohio R. R. Co. v. Woodward, 41 Md. 268; Vose v. Lancashire and Y. R. Co., 2 Hurl. and N. 728; Flike v. B. and A. R. R. Co., 53 N. Y. 549; Cooper v. Iowa Cent. R. R. Co., 44 Iowa, 134; Chicago, etc., Ry. Co. v. Taylor, 69 Ill. 461; Chicago, B. and Q. R. R. Co. v. George, 19 Ill. 510.

If these regulations be deviated from by order of the company itself, the company is bound to give to its employees reasonable notice of such deviation, and it will be liable for an injury occasioned by a failure to give such notice. Baltimore and Ohio R. R. Co. v. Whittington's Adm'r, 30 Gratt. 805.

If, however, the deviation be not by order of the company itself, a very different rule prevails.

Obedience to the regulations of a railroad company in regard to the running of trains is a matter of executive detail which neither the corporation nor any general agent of it can personally oversee, but as to which employees must be relied on. If those employees fail in their duty by breaking existing regulations, and in consequence other employees are injured, no action can be brought for the injury, as it will be deemed to have been caused by the negligence of a fellow-servant. Rose v. B. and A. R. R. Co., supra.

Some information may perhaps be derived from consulting the cases with reference to the obligations of a railroad company to passengers in this respect. Gordon v. Manchester and Lawrence Railway Co., 52 N. H. 596; Scars v. Eastern Ry. Co., 14 Allen, 433; Denton v. Gt. Northern Ry. Co., 5 Ell. and Bl. 860; Hamlin v. Gt. Northern Ry. Co., 1 Hurl. and N. 408; Hevin v. McCaughan, 32 Miss. 17.

In view of the authorities above cited there can be little doubt that the decision rendered in the principal case is good law. The evidence clearly showed that the company defendant had not been guilty of any negligence in providing for the safety of its employees. It had exercised due care and diligence in the selection of its servants, and it had established proper and reasonable regulations for the running of its trains. Having done all this, the law required it to do no more.

That the persons through whose negligence the plaintiff's decedent was injured were his co-employees admits of no doubt in view of the cases already cited. Flike v. B and A. R. R. Co., 53 N. Y. 549, which was so much relied upon by plaintiffs in error, cannot be deemed an authority to the contrary. There the plaintiff was a brakeman who had been injured by reason of the failure of a train-dispatcher to supply a sufficient number of brakemen to the train upon which plaintiff was employed. It was proved that the train-dispatcher was at the head of his particular department, and vested with power to discharge and employ at will persons acting in the capacity of plaintiff's decedent. Under these circumstances it was very properly held that the decedent and train-dispatcher were not co-employees; that the latter occupied properly the position of a vice-principal, and that therefore the company defendant was liable for the injury which had been done.

The principal case might seem at first sight to be in conflict also with the doctrine of Fuller v. Jewett, 80 N. Y. 46; 1 Am. and Eng. R. R. Cas. 109. But a little consideration will serve to show that these authorities are clearly distinguishable. In Fuller v. Jewett the point raised was whether the machinists of a railroad company, who are employed to manufacture and repair its engines, are properly to be considered co-employees of engineers employed to run those engines. The decision was that they were not, and although no very satisfactory reason is given for that decision, it was presumably on the ground that machinists and engineers are not engaged in the same general business, and under one executive management. The court was supported in this opinion by many authorities.

Ford v. Fitchburg R. Co., 14 Gray, 466; Houston, etc., R. Co. v. Dunham, 49 Tex. 181; Chicago, etc., R. Co. v. Jackson, 55 Ill. 492; Lewis v. St.

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Louis, etc., R. R. Co., 59 Mo. 495; Kansas Pacific Ry. Co. v. Little, 19 Kansas, 267; Illinois, etc., R. R. Co. v. Welch, 52 Mo. 183; Colorado, etc., R. Co. v. Ogden, 3 Col. 499; Cumberland Valley R. Co. v. State, 44 Md. 283; Shanny v. Androscoggin Mills, 66 Me. 420; Chicago, etc., R. Co. v. Gregory, 58 Ill. 272; Bridges v. St. L., I., M., etc., R. R. Co., 6 Mo. App. 389. Although see to the contrary, Hard v. Vt., etc., R. R. Co., 32 Md. 411; Long v. Pacific R. R., 65 Mo. 225; Manville v. Cleveland, etc., R. Co., 11 Ohio St. 417; McAndrews v. Burns, 39 N. J. L. 117; Columbus, etc., R. Co. v. Arnold, 31 Ind. 174; Waller v. S. E. R. R. Co., 2 Hurls. & Colt. 172; Killea v. Faxon, 125 Mass. 485; Hamathy v. Northern R. R. Co., 46 Md. 280.

In the principal case such a contention was clearly impossible. The telegraph operator, the conductor, the engineer and the plaintiff's decedent, who was a fireman, were beyond all peradventure engaged in one general employment, and under one executive management. They were in other words all co-employees, and for an injury occasioned by the negligence of either or any of them to another the company defendant was therefore clearly not liable. Cf. note to Holden v. Fitchburg R. R., 2 Am. and Eng. R. R. Cas. 94.

As to liability of the master for negligence or incompetency of employee who has charge and direction of other employees, see Murphy v. St. Louis, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 83; McDermott v. Hannibal, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 85; Michigan, etc., R. R. Co. v. Gilbert, 2 Am. and Eng. R. R. Cas. 230; Boyle v. Chicago, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 234; Ross v. Chicago, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 640; Day v. Toledo, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 126.

As to who are fellow-servants, see Walker v. Boston, etc., R. R. Co., 1 Am. and Eng. R. R. Cas. 141; Fuller v. Jewett, 1 Am. and Eng. R. R. Cas. 109; Cone v. Delaware, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 57; Henry v. Staten Island R. R. Co., 2 Am. and Eng. R. R. Cas. 60; Speed v. Atlantic, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 77; Cowles v. Richmond, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 90; Holden v. Fitchburg R. R. Co., 2 Am. and Eng. R. R. Cas. 94; Day v. Toledo, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 126; Smith v. Potter, 2 Am. and Eng. R. R. Cas. 140; Michigan, etc., R. R. Co. v. Gilbert, 2 Am. and Eng. R. R. Cas. 230; Boyle v. Chicago, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 234; Ross v. Chicago, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 640; Farley v. Chicago, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 108; Day v. Toledo, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 126.

Pittsburg, Cincinnati and St. Louis Ry. Co.

v.

George Henderson.

(*Advance Case, Ohio. February* 28, 1882.)

Where the superintendent of a railroad company has made an order as to the management of a particular train, which order will be reasonable or unreasonable according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable is a question of mixed law and fact, to be determined by the jury under proper instructions.

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Where an action is brought against a railroad company by one of its employees to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company as to the management of a particular train, which order was unreasonable and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in producing the injury, affords no defence to the action.

ERROR to the District Court of Harrison County.

Henderson brought suit in the Court of Common Pleas of Harrison County against the Pittsburg, Cincinnati and St. Louis Ry. Co. He was a laborer in the employ of the company upon a construction train which was on the main track of the railroad, in a deep rock cut, upon a heavy curve in the road. While he and the other laborers were at work loading the train with gravel, a freight train which was on its regular time was run into the construction train without warning of any sort, and by the wreck which resulted from the collision, Henderson was driven against the rocks, two or three of his ribs were broken, his shoulder was dislocated, and he was permanently injured. The action was brought to recover damages for the injuries, and in the court of common pleas there was a verdict and judgment in his favor for $3000, which judgment was affirmed in the district court, and this petition in error was filed to reverse the original judgment as well as the judgment of affirmance. The record contains all the evidence.

Construction trains have no place on the schedule or time-table, and by the printed rules of the company it is required that they shall be kept out of the way of all regular trains, freight as well as passenger, clearing their time at least ten minutes, and it is the duty of the conductor of the construction train to observe the time of all trains and obey the rule. This rule, however, may be suspended as to freight trains by special order of the superintendent of the railroad company, whenever he sees fit to do so, in which case it is the duty of the conductor of the construction train, where such train is being loaded on the main track, to keep the train in its place and send a man with a proper signal to notify approaching freight trains.

In this instance the superintendent had made such special order, and the conductor of the construction train, keeping his train on the track, had sent a flagman to notify the approaching freight train; but the flagman performed his duty so negligently and improperly that the engineer of the freight train understood his acts as an order to go ahead and not stop. The engineer says the flagman stood several yards from the railroad track, holding the flag down at his side with one hand and making motion with the other as for a foward movement. In this way the injury was occasioned, without any negligence on the part of the plaintiff. It would

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have taken six minutes to move the construction train to a side track from the place where it stood on the main track.

Barrett was superintendent of the company. He testified: "There are general printed rules for all trains, made in order to promote the safety of persons and property. I establish these printed rules. I am the superior officer for that purpose on this division. I give special orders and private instructions, as I think necessary, to annul or disregard the general rules. . . . They are not printed. . . . Construction trains cannot occupy the main track without special instructions. It is the duty of the conductors of construction trains to protect their trains. I gave special order, which annulled the general rule as to construction trains, allowing them to stand on the track until the arrival of freight trains, by sending back a flagman to notify approaching trains. I give special orders to construction trains where to work, and direct them by special orders from time to time, by telegram or otherwise."

Lowen was boss of the laborers employed on the construction train. He hired and discharged the men and regulated the time and manner of working. He had authority to require that the train should be moved, as he might direct, with reference to the work, but it was no part of his duty to observe the time of approaching trains, that matter being confided exclusively to the conductor. He was in the caboose until the freight train was within a few feet of the construction train, and barely escaped serious injury, but several persons beside Henderson were injured.

In the amended petition the negligence of the superintendent, "boss," and the conductor of the construction train, is stated, and the answer is a denial.

J. Dunbar, for plaintiff in error.

The duty implied as incident to the employment, and the question whether the special order was reasonable, were questions of law. 5 Ohio St. 567; 43 Ill. 421. The exception to the charge was sufficient. 10 Ohio St. 226; 29 Ohio St. 452; 32 Ohio St. 415.

J. M. Estep, for defendant in error.

Negligence is for the jury. 8 Ohio St. 580; 13 Ohio St. 66; 23 Ohio St. 10; 24 Ohio St. 639, 668; 28 Ohio St. 23; 31 Ohio St. 480; 32 Ohio St. 66; 35 N. Y. 10; 58 N. Y. 455; 77 N. Y. 72; Shearman & R. on Neg. § 11. Rules must be reasonable. Shearman & R. on Neg. § 93; 36 Ohio St. 226. Negligence complained of is negligence of company. Shearman & R. on Neg. § 89; 33 Ohio St. 468; 73 N. Y. 40; 81 N. Y. 206; 42 Md. 117, 136; 6 Bing. 716. Employee takes no risk of negligence of company. Ib.; 3 Ohio St. 201; 31 Ohio St. 287; 17 Ohio St. 197; 36 Ohio St. 221; Shearman & R. on Neg. §§ 5, 10, 89; 73 N. Y. 40; 53 N.

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Y. 553. Exceptions to charge in gross and hence insufficient. 25 Ohio St. 584; 30 Ohio St. 105; 32 Ohio St. 77; 21 Wall. 158.

OKEY, C. J.—Where a servant sustains injury by the negligence of his master, the master is liable in an action by the servant for damages. A breach of duty by the master is not one of the risks which one assumes in entering upon the employment of another. This breach of duty may consist in employing other servants who are incompetent, in providing unsafe machinery and structures, in failing to notify the servant of peculiar dangers known to himself but not to the servant, or in needlessly placing the servant in a place of danger.

As corporations act only through agents, it sometimes becomes important to determine what persons stand in such relation to it as that their negligence shall be deemed the negligence of the corporation, or, as sometimes expressed, who is to be regarded as merely a servant of the corporation, and who is in legal effect the master. Upon this subject the cases are by no means in harmony (Pierce on Rail. [ed. of 1881], 367; 2 Thompson on Neg. Ch. XX.; 11 Reporter, 42, 207, 591; 21 Am. L. Reg. 76); but it is unnecessary to enter upon any extended examination of them. No doubt can be entertained that one standing in the relation to the company sustained by Barrett, being the superintendent of the company, and clothed with power, at his own discretion, to make and suspend rules to regulate the running of all the trains on the road, is to be regarded, in a case of this sort, as in legal effect the master. And where one so in legal effect master, makes a special order with respect to the management of a particular train, which is, under the circumstances, unreasonable, and by the execution of such order a servant of the corporation, himself without fault, is injured, it will be no answer to the action of the injured party against the corporation to say, that the immediate cause of the injury was the negligence of a fellow-servant of such injured party in the execution of the unreasonable order. Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302; Hough *v.* Ry. Co., 100 U. S. 213; Fuller *v.* Jewett, 80 N. Y. 46; 1 Am. and Eng. R. R. Cas. 109; Smith *v.* Oxford Iron Co., 42 N. J. L. 467; Ohio and M. R. Co. *v.* Collarn, 73 Ind. 261; 4 Am. and Eng. R. R. Cas.; Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389; Cumberland, etc., R. Co. *v.* The State, 44 Md. 283; Ford *v.* Fitchburg, etc., R. Co., 110 Mass. 240; Berea Stone Co. *v.* Kraft, 31 Ohio St. 287; Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 221; 4 Am. and Eng. R. R. Cas.

Whether a rule of a railroad company is or is not a reasonable rule, is in many cases a question of law; but in this case it cannot be affirmed as a matter of law that the special order made by superintendent Barrett was reasonable. On the contrary, whether such order was reasonable or unreasonable was a question of mixed

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law and fact proper for the determination of the jury, in view of the circumstances under which the order was to be executed, and upon proper instructions as to the law. The jury found that the order was unreasonable, under the circumstances, and we are not prepared to say that the finding was wrong.

Objection is made that the court permitted the petition to be amended after the evidence was closed, and also permitted the jury, after the verdict was announced, to retire for the purpose of correcting it. But these matters rested in the discretion of the court, which seems to have been exercised in furtherance of justice. And as to the request to charge and the charge given to the jury, the exception was general and not specific, and, looking to the whole record, we cannot say the action of the court was so prejudicial to the company, in any respect, as to afford ground of reversal.

Judgment affirmed.

See note, p. 525.

THE PITTSBURG, CINCINNATI AND ST. LOUIS RY. CO.

v.

ALBERT M. RANNEY.

(*Advance Cases, Ohio. March* 27, 1882.)

An engineer and brakeman are fellow-servants, engaged in a common service. A railroad company is not responsible to a brakeman for an injury occasioned by the negligence of the engineer.

C. N. OLDS and Lorenzo English, for plaintiff in error.

Walter B. Page and T. E. Powell, for defendant in error.

On the 2d of August, 1871, the plantiff below was employed as a brakeman on a train of freight cars of the defendant running from Columbus, Ohio, to Dennison, Ohio, under the management of a conductor, an engineer, a fireman, and two brakemen. On approaching Pataskala station the train was moving at the speed of about fifteen miles per hour when a flag signal from the station was given to slow the train for orders, whereupon the engineer, by a single blast of the locomotive whistle, signalled the application of brakes by the brakemen, and thereby the speed of the train was reduced to six or eight miles per hour when opposite the station house. While moving at this rate the engineer received dispatches from the station agent, and also orders to proceed without

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stopping at the station, whereupon by two blasts of the whistle the engineer signalled the removal of the brakes by the brakemen. While the plaintiff, in obedience to the signal, was engaged in removing brakes, and before a reasonable time for the removal had elapsed, the engineer applied steam to the engine so violently as to break and separate the train at the coupling of the cars where the plaintiff was engaged in removing brakes, whereby the plaintiff was thrown from his feet and fell between the cars and was thereby very seriously injured, so that it became necessary to amputate his left leg above the knee, and three toes from the right foot.

In stating his cause of action, the plaintiff alleged in the petition, among other things, the following:

"This plaintiff states that it then and there became the duty of this plaintiff, when on said train of cars as brakeman as aforesaid, to obey and carry out in a prompt and reasonable manner all orders or commands given to him in any manner by the engineer, then and there handling, operating, and controlling the locomotive attached to said train of cars, and hauling the same from Columbus to Dennison, as aforesaid, in reference to putting on or letting off the brakes attached to the cars, making up and forming said train of cars so hauled and moved by said locomotive, and that in said employment of brakeman on said train he was under the command and order of said engineer, and therefore compelled to obey the orders and commands given by said engineer to him in reference to using said brakes in the starting or stopping said train of cars; and, as above stated, in said operating, hauling, and moving said locomotive and train of cars attached thereto, said engineer was in all respects the superior of this plaintiff, and it was his duty to give orders and commands to plaintiff when on said train of cars, in reference to the time and place, and under what circumstances said brakes should be applied to the stopping or impeding the speed of said train, and when the same should be let off or loosened in order that the train might be enabled to move at a greater rate of speed."

The plaintiff further says that said injuries were so inflicted upon him without any fault, neglect, or carelessness on his part, and whilst he was in the proper discharge of his duties as a brakeman on said train of cars aforesaid, in an ordinary, careful, and prudent manner, and plaintiff avers that said injuries were so inflicted upon him as hereinbefore stated by reason of the negligence, default, and want of proper care and caution, and by reason of the rashness, negligence and carelessness of the said engineer, who had charge of the said locomotive, its movements, management, and control as aforesaid, and who gave said order and commands to plaintiff, and the said injuries were caused by the said engineer as aforesaid, by his sudden and rapid starting of said locomotive and cars in motion, without signal or warning to plaintiff or other em-

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ployees, and without the said engineer waiting a sufficient or reasonable time to enable plaintiff to obey and carry out his order or command to let off or loosen brakes as aforesaid; in all which, said engineer was guilty of the most grossly negligent, improper, rash, and careless conduct, which, as aforesaid, was the sole cause of the infliction of said injuries upon plaintiff hereinbefore stated.

The defendant, by its answer, denied that the engineer was guilty of carelessness or negligence as charged in the petition, and also, "that in virtue of said employment he (plaintiff) thereby became, and was in fact, subject to the orders and control and direction of the engineer of said freight train, or that said engineer thereby became, and was in fact, in all respects his superior upon said train, whose orders and commands he was in all respects bound to obey. On the contrary thereof, the defendant avers that said train was on said day under the charge and control of a conductor, who was, as such conductor, the superior of both said engineer and brakeman, and whose orders and commands both said engineer and brakeman were alike bound to obey in said common service and in subordination to said superior servant of said defendant."

In the answer the plaintiff replied as follows: "That this plaintiff admits that there was on and connected with said train of cars mentioned in plaintiff's petition a conductor, who was the superior of plaintiff, and in reference to the time of starting said train at stations where it stopped was the superior of said engineer, but plaintiff says that in all respects as to the starting, stopping, controlling, and movements of said engine and the cars attached thereto both said engineer and conductor were, in all respects, the superiors of plaintiff, and both were the responsible parties in charge of said train as to said plaintiff and said railway company."

On the trial in the Common Pleas, a verdict and judgment were rendered for the plaintiff. A bill of exceptions, containing all the testimony and the charge of the court, was made part of the record. The judgment of the Common Pleas was affirmed in the district court, and this proceeding is prosecuted by the railroad company to reverse both judgments.

McIlvaine, J.—The principles of law in relation to the liability of a master for an injury to his servant while engaged in the performance of duties under his employment have been so frequently considered and declared by this court, and upon such varied statements of fact, that one might be justified in assuming that the law upon this subject, in all its bearings, has been fully settled. The respective rights and duties of employer and employee, sound in contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employee, and among other things to exercise reasonable care in the selection of prudent fellow-servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the per-

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formance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow-servant or not, in the ordinary sense. The superior in his relation to the subordinate servants is, in the language of Judge Day, in Railway Co. *v.* Lewis, 33 Ohio St. 196, the alter ego of the master. This doctrine, which imputes to the master the negligence of a servant to whom he has delegated authority over other servants, has been firmly ingrafted in the jurisprudence of this State ever since the case of The Little Miami R. R. Co. *v.* Stephens, 20 Ohio R. 416. See also C., C. and C. R. R. Co. *v.* Keary, 3 Ohio St. 201, and L. S. and M. S. R. R. Co. *v.* Lavally, 36 Ohio St. 221, and cases therein cited.

On the other hand, the servant assumes all ordinary risks of the employment against which ordinary care on the part of the master does not provide; and among the risks thus assumed by the servant are those which may result from the carelessness or negligence of fellow-servants. Indeed, in the case before us, it is not claimed by the defendant in error that the railroad company should be held liable, if it were free from negligence actual or imputed; and it is considered that such would be the case if the engineer and himself were fellow-servants in a common employment. Nor is it denied by the railroad company that it would be liable if the injuries of the defendant in error were caused by the carelessness of one of its employees who was intrusted with power to control and direct the defendant in error in the discharge of his duties in their common employment.

The contention between the parties is not whether a given proposition is or is not law, but rather as to a question of mixed fact and law, namely, whether such relation of superior and subordinate existed between the engineer of the train and the defendant in error as rendered the plaintiff in error responsible for an injury to the latter caused by the carelessness of the former. The case is one for the application rather than the definition of legal principles. We must therefore ascertain the exact relation which existed between the engineer and the defendant in error. They were both servants of the railway company engaged in a common employment, to wit: the operation of a single train of cars. The service of the engineer was confined to the care and management of the engine, the motive power of the train, while the defendant was employed upon the cars, and his duty, among other things, was to tighten and loosen the brakes upon the cars. Although the duties of these servants were not identical, yet as the services of each were necessary to the accomplishment of a single purpose—namely, the movement of the train —they were fellow-servants in a common employment, so that if this relation and none other existed between them the risk of injury to either by the carelessness of the other was assumed by each, and the common master and employer would not be liable. See

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Whaalan *v.* M., R. and L. E. R. R., 8 Ohio St. 249; Manville *v.* C. and T. R. R. Co., 11 Ohio St. 417; P., Ft. W. and C. Ry. Co. *v.* Devenney, 17 Ohio St. 198; Kumber, Adm'r of Larken, *v.* Junction R. R. Co., 33 Ohio St. 150.

This brings us to inquire whether there was such relation of superior and subordinate existing between the engineer and brakeman as to render the common employer responsible for injuries to the latter caused by the negligence of the former. The crew consisted of a conductor, engineer, fireman, and two brakemen. Unquestionably the train was under the control of the conductor, and all the train hands were subject to his control and direction. By the rules of the company "conductors are required to see that brakemen are attentive to duty. Two brakemen must at all times be stationed on the top of the cars of each freight train when the train is in motion. The speed of freight trains must be governed by the use of brakes when descending grades"—was not to exceed fifteen miles per hour. "Conductors of all trains are required to keep a brakeman on the last car while the train is in motion." "Freight conductors are required to ride on a part of their train where they can see that their men attend to their duties, can signal them on descending grades, and can assist in applying the brakes in case of danger." "Brakemen must use judgment in applying the brakes when approaching a station and endeavor to stop the train at the right point without the necessity of the engine sounding the whistle."

These rules, as well as the weight of all the testimony, show that brakemen are under the general control and direction of the conductor.

Indeed, the only pretence found in the testimony for the claim of defendant in error that brakemen are subordinate to the engineer of the train is found in the fact that it is the duty of brakemen to observe and obey certain signals given by the engineer, to wit: Rule 18. "One long blast of the whistle is the warning of the approach of a train; one short blast is a signal for putting down brakes and stopping the train; two short blasts for releasing the brakes and starting the train; three for backing the train." It is contended that the signals are in the nature of orders or commands which the engineer is authorized to give to brakemen, which they are bound to obey; and, hence, the relation of superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakemen, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen. The signal is a mere notice,

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The rule is the order of the company to the brakemen directly. Suppose a train is signalled by a station agent, as this train was, to stop for orders. It thereby becomes the duty of the conductor as well as of each employee on the train to stop for orders; and yet, no one can contend that such station agent who gives the signal is the superior, and train crew subordinate employees of the company within the meaning of the rule under consideration. A variety of signals under a variety of circumstances are required to be given by different employees of the company to signify that an occasion exists for the performance of a particular duty; but it would be absurd to hold that in each case the employee giving the signal is a superior servant, to whom all others to whom information is thus communicated are subordinated; so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal or in the performance of other duties.

For it must be observed that negligence or carelessness is not affirmed of the act of the engineer in giving either the signal to tighten the brakes or to loosen them. The only negligent and careless act charged against him was in forcing the engine forward violently without giving time to the brakemen to loosen the brakes. The signal informed the brakeman that the train was about to go forward. The rule is, "Two short blasts for relieving the brakes and starting the train." The matter of applying the steam to the engine, and starting the train forward, was under the control of the engineer alone, and although we think upon the testimony the act was recklessly performed and caused a very serious injury to the brakeman, it was nevertheless within the risks assumed by the defendant in error when he engaged with the plaintiff in error to discharge the duties of brakeman on the train. This conclusion of the court is fully sustained by the supreme court commission in P., Ft. W. and C. Ry. Co. *v.* Lewis, 33 Ohio St. 196. That case was an action by a brakeman against the railway company for an injury caused by the negligence of the engineer, and the negligent act complained of was in starting the train while the brakeman was in a dangerous position without giving the required signal. We refer to the very able opinion of Judge Day, without quoting from the case further than fourth proposition in the syllabus, which reads as follows: "Where an engineer and brakeman were employed by a railroad company in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engineer other than what may be implied from the rules of the company, requiring the engineer to give certain signals as "a notice" to apply or loose the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engineer," and placing the brakeman while on the train in subordination to the conductor,—*Held*, that the en-

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gineer and brakeman were servants of the company, engaged in a common service; that the relation of superior and subordinate did not exist between them; and that, therefore, the company was not responsible to the brakeman for an injury occasioned by the negligence of the engineer."

True, in the case before us several witnesses testified that on the road of plaintiff in error brakemen are subordinated to the engineer of the train; but upon the whole record it is quite evident that the information of the witnesses was based solely upon the rules above quoted in regard to the giving and obeying signals for setting or relieving brakes, so that in point of fact this case in this respect is exactly similar to Lewis' case, and a majority of the court can see no good reason for overruling that decision.

Judgments reversed and cause remanded.

OKEY, C. J., dissenting.—A railroad company is liable in this State for the negligence of a conductor causing injury to a brakeman upon the ground that the company has placed the conductor in a position of superiority to the brakeman. But there is no magic in the word conductor; and if the brakeman is bound to obey the orders of the engineer in applying and loosening brakes, as he clearly is, and while obeying such orders is injured by the negligence of the engineer, it is difficult to find satisfactory ground for holding that the company is not equally liable. Argument, however ingenious, based on a distinction between such cases, has for its support no valid reason and is necessarily fallacious. In my opinion the law of this State is, that wherever a master has in his employ two or more persons, and the nature of their employment is such that one is required to give orders to the others, who are bound to obey, and while doing so are injured by the negligence of the person placed in such position of superiority the master is liable; and it is immaterial whether the negligent person was known as conductor, engineer, or by other designation.

In this case the company is clearly liable in my judgment by a just application of the principle I have stated. By the very nature of the employment the brakeman was subordinate to the engineer. But that view is much strengthened by reference to the "general rules for running trains," which are made part of the record. In looking into those rules I find they do not support the theory that the conductor alone is superior to the brakeman. On the contrary, the engineer is under the rules of the company in many things as much superior to the brakeman, and as much beyond his control or advice, as the conductor, and the brakeman is quite as likely to be injured by the negligence of the former as the latter. The company speaks as emphatically and as potently through the engineer as through the conductor. Take the very case under consideration. Pataskala was not a regular stopping place for this

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freight train. The conductor gave no signal to stop, but the engineer, in pursuance of a rule of the company, did give the signal for such purpose. The rules provide, inter alia: "One short blast is a signal for putting down the brakes and stopping the train; two short blasts for relieving the brakes and starting the train. . . . When the signal bell on engine is rung by conductor to stop at next station the engineer will answer the signal with two short whistles. Engineers will also give the same signal when it is seen to be necessary to stop at a station at which he has not been signalled to stop by the conductor." Engineers "will be held equally responsible with the conductors in case of any violation of the rules and regulations of the road."

Here the engineer gave the signals because the company, by fixed rules, commanded him to give them without waiting for any order of the conductor, and the brakeman obeyed the signals because it was his imperative duty to do so under the rules of the company. And the same rules which required the engineer to give the signals made it his duty, when the brakes were loosened, to put on more steam so as to increase the speed. The engineer in performing this last duty, however, was guilty of gross negligence; he started the train so suddenly as to break it into three sections and maim Ranney for life; and it is fair to say that Ranney would not have been injured if he had not been at the very moment obeying the orders of the company, given through the engineer, to loosen the brakes.

The conductor performed no office whatever at or before reaching Pataskala station—there was none for him to perform. The injury would have happened the same way to the same extent, and from the same cause—i. e., the negligence of the company acting through the engineer—if the conductor had been absent from the train. Shall we segregate the acts of the engineer performed in the few moments which elapsed from the time of giving the signal to apply the brakes until the injury occurred, holding that in giving the signals he was the company's alter ego, and in putting on more steam a fellow-servant of Ranney—his right hand the company, his left a mere fellow-servant? Surely there is no real foundation for any such distinction.

Ry. Co. *v.* Lewis, 33 Ohio St. 196, was, I think, wrongly decided, and of the same opinion were two of the five judges who heard that case, and the view of the majority in this case is in my judgment equally erroneous.

WHITE, J., dissented on the same ground.

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THE HOUSTON AND T. C. R. R. CO.

v.

JOHN WILLIE.

(53 *Texas Reports*, 818. *May* 7, 1880.)

In a suit against a railway corporation, service of process was made in August, 1874, under the provisions of the act of February 7, 1854 (Pasch. Dig., art. 4888), "by leaving with the within-named defendant, the H. and T. C. R. R. Co., at their chief office in Houston," a true copy of the citation and the accompanying certified copy of plaintiff's petition. On the proposition that a motion to quash the service should have prevailed, *Held*—

1. The second section of the act of March 21, 1874, entitled "An act to fix the venue in certain cases," and the second section of the act of April 17, 1874, entitled "An act to confer jurisdiction in certain cases," did not repeal by implication the provisions of art. 4888, Pasch. Dig., but were intended to be cumulative.

2. The motion to quash was properly overruled.

In a suit for damages for personal injuries, brought by a brakeman against a railway, in which the unskilfulness and incompetency of the engineer were charged as causes of the injury, the court admitted in evidence the declarations of the engineer to the plaintiff, to the effect that he would as soon run over him as not. *Held*—

1. The evidence was admissible, as a circumstance showing the want of care on the part of the company in the selection of him as its engineer, but it should have been so restricted by appropriate instructions to the jury.

2. The personal malice indicated by the declaration, if the cause of the injury, would not render the company liable for actual damages thus inflicted on a fellow-servant, and the jury should have been so instructed.

In a suit for damages by an employee of a railway company for injuries sustained, which permanently disabled him, the jury were instructed that, if they found for plaintiff, to find no greater sum than a sum which, put at interest, would produce annually a sum equal to the difference between what plaintiff could earn before his injury, and what his ability would be restricted to earning, in consequence of the injury. *Held*, error.

If a railway company is not guilty of negligence in the selection of an engineer, it is not liable to his fellow-servant for injuries resulting to such fellow-servant from the want of proper care on the part of the engineer.

APPEAL from Travis. Tried below before the Hon. E. B. TURNER.

The case is sufficiently stated in the opinion.

Hancock, West & North, for appellant.

I. The acts of March 21, 1874 (Laws of 1874, 31), and of April 17, 1874 (Laws of 1874, 107), require service of citation to be made on the president, secretary, treasurer, principal officer or agent of a corporation, and repeal that portion of article 4888 of Paschal's Digest which authorized another mode of service. Bryan *v.* Sundberg, 5 Tex. 424; Rogers *v.* Watrous, 8 Tex. 65; Stirman *v.* State,

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21 Tex. 736; Fayette Co. v. Faires, 44 Tex. 517; United States v. Case of Hair Pencils, 1 Paine C. C. 400; Dean of Ely v. Bliss, 5 Beav. 582; Potter's Dwarris on Statutes, 154–160; Missouri v. Severance, 55 Mo. 378, 386, 387; United States v. Tynen, 11 Wall. 88; Harrington v. Rochester, 10 Wend. 548; People v. Burt, 43 Cal. 561; Rex v. Cator, 4 Burr. 2026; Robinson v. Schmidt, 48 Tex. 17; Norris v. Crocker, 13 How. 429; Evansville v. Bayard, 39 Ind. 450; Thorpe v. Schooling, 7 Nev. 15; Ex Parte Smith, 40 Cal. 419; Parrott v. Stevens, 37 Conn. 93; Cumberland v. Magruder, 34 Md. 381; N., L., N. R. R. Co. v. B. and A. R. R. Co., 102 Mass. 386.

II. Appellant is not liable to appellee for injuries which he may have received from the engineer, Cederburg, by reason of the latter's malicious acts, and this evidence objected to was irrelevant, and calculated to prejudice appellant before the jury. The court refused to exclude from the consideration of the jury the uncalled for statement of appellee, while testifying, to the effect that his co-servant had said to him (appellee) just before the accident, "You black son of a bitch, I'd just as soon run over you as not." "Cederburg was mad, and cursed me when I told him to back slowly." This suit is brought for the recovery of damages caused by appellant's negligence.

III. In order that a servant may be entitled to recover damages from his master for the acts of his fellow-servants, while both are in the discharge of their common employment, he must show negligence on the part of the master in selecting an incompetent fellow-servant, or in retaining him after his incompetency is brought to the master's knowledge. On this point appellant asked the court to charge as follows: It is not sufficient for plaintiff to show that the engineer may have been negligent at time of accident, or that the drawhead was defective, but he must also show that defendant was negligent in employing the engineer, and in providing the machinery. And if plaintiff knew the defective condition of the drawhead, and failed to use precautions commensurate with the increased risk, plaintiff cannot recover, if the injury was caused by the want of such precautions. Price v. H. D. N. Co., 46 Tex. 535; R. R. Co. v. Miller, 51 Tex. 274; Robinson v. Ry. Co., 46 Tex. 549.

IV. In order that a servant may recover damages from his master for injuries sustained while in the discharge of his duties, from defective machinery, he must show negligence on the part of the master in providing unsuitable and dangerous apparatus, or in allowing it to remain in such condition after he has been informed of its defective condition, and if the servant continues to be content to use such defective machinery, he runs the additional risk thus knowingly and freely incurred by him. On this point, and in connection with the last proposition, the court instructed the jury that

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"if the coupling apparatus was out of repair, and in such condition as to render the work of coupling more dangerous and hazardous than ordinarily," and the engineer backed, etc., then plaintiff should recover. On this point appellant asked the court to charge as shown under the last proposition. Ladd v. New Bedford R. R. Co., 119 Mass. 412; Gildersleeve v. F. W., J. & S. R. R. Co., 33 Mich. 133; Shearman & Redfield on Negligence (2d ed.), 111–127; Redfield's Law of Railways (4th ed.), 465 et seq.; Southern Law Review, April, 1876, article by Judge Cooley; Cannon v. C., R. and P. R. R. Co., 19 Mo. 285; Gibson v. Erie Ry. Co., 63 N. Y. 449; Moss v. P. R. R. Co., 49 Mo. 167; Dewey v. C. and N. W. Ry. Co., 31 Iowa, 373; Devitt v. P. R. R. Co., 50 Mo. 302; Dow v. Kansas P. Ry. Co., 8 Kan. 642; U. P. Ry. Co. v. Milliken, id. 647; R. R. Co. v. Doyle, 49 Tex. 198; U. P. Ry. Co. v. Young, 8 Kan. 658.

V. The measure of damages is the actual amount of damages proved on the trial as the direct consequence of the injury.

VI. The court erred in overruling defendant's motion for new trial, for all the reasons set forth in said motion.

VII. The verdict is against the evidence, and unsupported by evidence. It is excessive and oppressive.

John W. Robertson for appellee.

I. The court did not err in overruling defendant's motion to quash the return of service of the citation. Pasch. Dig., art. 488; Act March 21, 1874 (General Laws 1874, p. 31); Act April 17, 1874 (General Laws 1874, p. 107); Art. 12, sec. 17, Const. 1869; Breen v. T. and P. R. R. Co., 44 Tex. 303; Thouvenin v. Rodrigues, 24 Tex. 478; Cain v. State, 20 Tex. 358; State v. Delesdenier, 7 Tex. 105–108; 1 Sm. and Marsh. 590; Seymour v. Cooley, 9 La. 73; 9 Bac. Ab., title "Statute," letter I, § 9, p. 243; Pasch. Dig., art. 117; Rules for District Court, No. 5355.

II. The evidence excepted to was not irrelevant, and could not and did not prejudice appellant before the jury. 1 Greenl. Ev., 108 et seq.

III. The court did not err in its charge to the jury on the measure of damages. R. R. Co. v. Le Gierse, 51 Tex. 203; R. R. Co. v. Miller, 49 Tex. 322; Chicago and N. W. R. R. Co. v. Jackson, 55 Ill. 492.

IV. The court did not err in its instruction as to appellant's liability to appellee for damages sustained by him while in the employ of appellant. A servant is entitled to recover from the master damages sustained by the acts of a careless, incompetent or imprudent fellow servant, when the master retains such incompetent fellow servant in his service after his unfitness is known to the master, or might have been known, by the exercise of ordinary care. Appellant denied only that he had been negligent in selecting servants and in providing suitable machinery, etc., and appellee with want

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of care. The jury believed the evidence sufficient to sustain the charge of negligence in retaining this engineer in service by appellant. The charge of the court presents the law as applicable to the facts proved. The terms "agents and employees," as used in the charge, clearly meant, when the charge is considered as a whole, those who made up the train under appellant's orders and who were responsible for the condition of the cars and their appliances, and Cederburg, the engineer, whose reckless and imprudent conduct was in evidence. There was no evidence as to negligence on the part of any other employee, and the jury could not have misunderstood the charge. H. and G. N. R. R. Co. *v.* Randall, 50 Tex. 259; R. R. Co. *v.* Gorbett, 49 Tex. 580; Price *v.* H. D. N. Co., 46 Tex. 537; Hough *v.* T. and P. R. R. Co., 100 U. S. 213; 1 Redfield on Railways, 544; Gilman *v.* Eastern R. R. Co., 13 Allen, 433; Laning *v.* N. Y. C. R. R. Co., 49 N. Y. 521 et seq., Ill. Central R. R. Co. *v.* Jewell, 46 Ill. 99; Moss *v.* Pacific R. R. Co., 49 Mo. 167; P., F. W. and C. R. R. Co. *v.* Ruby, 38 Ind. 294; Davis *v.* Detroit, etc., R. R. Co., 20 Mich. 105; McMahon *v.* Davidson, 12 Minn. 357; Weger *v.* Pa. R. R. Co., 55 Pa. St. 460; Frazier *v.* Pa. R. R. Co., 38 Pa. St. 104; Wright *v.* N. Y. Central R. R. Co., 28 Barb. 80; Hutchinson *v.* Railway Co., 5 Exch. 343.

V. The master is bound to provide his servant with safe and suitable machinery and apparatus with which to perform the labor he is engaged to do, and if the servant is injured by reason of the master's negligence in providing him with defective machinery, the master will be liable for the damages sustained. H. and G. N. R. R. Co. *v.* Randall, 50 Tex. 259; H. and T. Ry. Co. *v.* Oram, 49 Tex. 344; Same *v.* Dunham, id. 185, and cases cited in opinion; R. R. Co. *v.* Doyle, id. 198; Hough *v.* T. and Pacific R. R. Co., 100 U. S. 213, and cases cited; Keegan *v.* Western R. R. Co., 8 N. Y. 175; Noyes *v.* Smith, 28 Vt. 59; Snow *v.* Housatonic R. R. Co., 8 Allen, 441; Hackett *v.* Middlesex Manuf'g Co., 101 Mass. 101; Ill. Central R. R. Co. *v.* Welch, 52 Ill. 183; Fifield *v.* N. R. R., 42 N. H. 225; Flike *v.* B. and A. R. R., 53 N. Y. 549; C. and N. W. R. R. Co. *v.* Swett, 45 Ill. 197.

VI. The agent and employees of a railway company, whose duty it is to inspect its cars and make up its trains, are not fellow servants of the brakeman who is engaged in running the train, and the master will be responsible to the brakeman if he is injured through the negligence of such employees. H. and T. C. R. R. Co. *v.* Dunham, 49 Tex. 185; Flike *v.* B. and A. R. R., 53 N. Y. 549; Ford *v.* Fitchburg R. R. Co., 110 Mass. 240; Wright *v.* N. Y. Central R. R. Co., 25 N. Y. 562; Chicago and N. W. R. R. Co. *v.* Jackson, 55 Ill. 492.

BONNER, ASSOCIATE JUSTICE.—The appellee, John Willie, sued the appellant, the Houston and Texas Central Ry. Co., for al-

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leged damages for injuries occasioned when in the discharge of his duty as brakeman, in an attempt to couple the train of the defendant company, which resulted in the loss of an arm, and by which he has been permanently disabled.

The legal grounds of his complaint may be stated in general terms to have been alleged carelessness on the part of the defendant company in the employment of other servants who were incompetent and unskilful, and particularly the engineer, Cederburg, in charge of the train; and in the failure to furnish proper coupling apparatus, which rendered his service unusually hazardous and dangerous.

Among other defences, there was a motion to quash the return of service, which was overruled.

On the trial judgment was rendered for plaintiff for $2,000, from which this appeal is taken.

The first error assigned is, that "the court erred in overruling appellant's motion to quash return of service of citation."

The proposition of defendant under this assignment is, that "the acts of March 21, 1874 (Laws of 1874, 31), and of April 17, 1874 (Laws of 1874, 107), require service of citation to be made on the president, secretary, treasurer, principal officer, or agent, of a corporation, and repeal that portion of article 4888 of Paschal's Digest which authorized another mode of service."

The return on citation shows that it was served by the sheriff of Harris county, "by leaving with the within named defendant, the H. and T. C. Ry. Co., at their chief office, in Houston, Texas, a true copy of this citation and the accompanying certified copy of plaintiff's petition."

This service was made under the act of February 7, 1854 (Pasch. Dig., art. 4888), to regulate railroad companies, which provided that "all process against such company shall be served on the president or secretary, or by leaving a copy at the principal office of the company."

The subsequent act, March 21, 1874 (14th Leg., 31) is entitled "an act to fix the venue in certain cases."

The first section provides for the institution of suits against public or private corporations, including railroad companies, in any county where the cause of action, or a part thereof, accrued, or in any county where such corporation has an agency, or representative, or in the county in which the principal office of such corporation is situated.

The second section provides that service of process on any such corporation may be had by delivering a copy of such process . . . to the president, secretary, treasurer, principal officers or the agent.

The act of April 17, 1874, is entitled "an act to confer jurisdiction of certain civil causes on the courts in the several counties in this state."

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By section first it is provided that any public or private corporation . . . may be sued in any county in this state in which the cause of action, or any part thereof, arose.

By section second it is provided that service of process may be had on any such corporation by the delivery of a copy to the agent or person representing the same, in the county in which the cause of action, or a part thereof, arose.

We are not advised why the legislature, at the same session, passed two separate statutes, so similar in their provisions that they could have been very appropriately incorporated into one and the same act.

As service was not had in this case under the second section of the act, March 21, 1874, we pass by the question raised in Breen v. R. R. Co., 44 Tex. 302, of the constitutionality of that section, because its object is not sufficiently expressed in the caption.

When we consider the mischief intended to have been remedied, evidently the controlling object of both these acts was to confer that jurisdiction upon the courts of the county in which the cause of action originated, which formerly was exercised by the courts of the domicile of the corporation; and that the provision for service of process was but incidental to this controlling object.

Although to some extent they embrace the same subject matter of the act of February 7, 1854 (Pasch. Dig., art. 4888), yet we do not believe that they were intended to so entirely comprehend it, as to repeal by implication this former statute, but were rather intended to be cumulative.

So far as advised, this is the view generally entertained by the profession, and which has been practically acted upon by the courts.

It may be remarked in this connection, that in the revised statutes, which supersede all the above, the provision of the old law under which service was had in this case has been retained, with the addition, that the copy must be left at the principal office of the company "during office hours." R. S., art. 1223.

We are of opinion that the court did not err in overruling the motion to quash the return of service.

The second assigned error is that "the court erred in its rulings on the evidence as disclosed by defendant's bill of exceptions herein."

The proposition under this assignment is, that "appellant is not liable to appellee for injuries which he may have received from the engineer, Cederburg, by reason of the latter's malicious acts, and this evidence objected to was irrelevant, and calculated to prejudice appellant before the jury."

The bill of exception shows that the court refused to exclude from the jury the uncalled-for statement of appellee, Willie, when testifying, to the effect that just before the accident, in response to

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a request from him to Cederburg, the engineer, to back slowly because the draw-head was bent, the latter, addressing him by an opprobrious epithet, said, "I would as soon run over you as not." The witness further testified that Cederburg was mad and cursed me when told to back slowly.

As the testimony may have tended to prove that Cederburg was reckless, it may, if supported by other satisfactory evidence that the defendant's company did not use proper care in selecting him, have been admissible under this issue, if thus restricted by the court.

The language of the engineer, however, indicated personal malice toward plaintiff, which of itself, if the cause of the injury, would not have made the company liable for actual damages even, they being fellow servants. Price *v.* Navigation Co., 46 Tex. 535; Robinson *v.* Railway Co., id. 540; Railroad Co. *v.* Miller, 51 Tex. 274.

Considered in this aspect, the evidence, unless restricted as above stated, and particularly when taken in connection with a portion of the charges referred to in another assignment, may have improperly influenced the jury.

The third error assigned is, that "the court erred in its charge to the jury on the measure of damages, and also on the liability of the defendant for damages sustained by its employee while in the discharge of his duties to defendant." This alleged error presents two questions relating: 1. To the measure of damages. 2. To the liability of the defendant company to the plaintiff as its employee.

First. As to so much of the charge as relates to the measures of damages. The court charged the jury on this question as follows: "The only damages are the actual damages sustained by plaintiff as revealed by the evidence; and the only item of damages upon which there is any evidence, is in the inability of plaintiff now to earn or secure wages for his labor such as he was receiving at the time of the injury, and the difference between his ability before the injury and his ability since to earn wages, is and must be the basis of computation in case he is entitled to recover. If you find for the plaintiff, find no greater sum than, put at interest at the agreed rate, will produce annually a sum equal to the difference between what plaintiff could earn before and what he can now earn in consequence of the injury."

The latter portion of this charge we think was objectionable, in assuming as a question of law that the jury might, as a legal basis for the measure of damages, find for the plaintiff an amount, the interest upon which would annually produce a sum equal to the difference between what plaintiff could earn before and what he can now earn in consequence of the injury.

If compensation for lessened ability to labor be assumed as the true measure of actual damages, then it would seem that it should not be such sum as would bring an annual interest corresponding

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with the annual value of this lessened ability, leaving the principal sum still belonging to the estate of plaintiff after his death, although he had then become wholly incapacitated for labor; but would be an amount which would purchase an annuity equal to to this interest, during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life..

Second. As to so much of the charge as relates to the liability of the defendant to the plaintiff as its employee.

On this issue the court charged the jury that "the defendants are bound to have their cars in ordinary good condition to do the work usually done by railroad cars, and to have servants and employees who possess ordinary skill and who exercise proper care and caution consistent with the work to be done. The plaintiff, in order to recover from the defendant, must show to your satisfaction that under the circumstances the injury to the plaintiff did not arise from a want of proper care and caution on his part, and that the injury arose by reason of some fault or negligence of the defendant or their agents or employees. If, in this case, the coupling apparatus upon the cars was out of repair, and in such condition as to render the work of coupling more dangerous and hazardous than is ordinary, and the engineer backed up the train in such a manner as to render the coupling unnecessarily difficult and dangerous with reference to the condition of the coupling apparatus, and the plaintiff was exercising that degree of caution that a prudent man who knew the condition of the coupling apparatus would exercise, then plaintiff is entitled to recover of defendant for the injury done him."

The defendant company, if it was not guilty of negligence in the selection of a competent engineer, was not liable for his want of proper care, which may have resulted in the injury to plaintiff.

Although such negligence on the part of the company was alleged in the petition, yet that portion of the charge in which the jury were virtually instructed that they might, as a basis for their verdict, consider the fault or negligence of the agents or employees of the company, or the manner in which the engineer "backed up" the train, was, in our opinion, calculated to so mislead, that they might have based their verdict solely upon the fault or negligence of a fellow servant; and particularly when considered in connection with the language used by the engineer just before the injury, tending to show malice on his part toward plaintiff.

We think, then, that there was error in the charge in not distinctly separating the liability of the defendant by reason of alleged negligence in furnishing proper apparatus for coupling the cars, or in the employment of a competent engineer, from a mistaken liability which the jury might have inferred from a want of proper care on the part of the engineer at the time, and that this error was not corrected by other portions of the charge.

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It is appropriate to say that the trial below was had before the principal questions which arise in the case were settled in this state by recent decisions of this court, and which render it unnecessary to further consider the errors assigned. Judgment reversed and cause remanded.

Reversed and remanded.

[Opinion delivered May 7, 1880.]

MOORE, C. J.—I concur in the conclusion of the court that the court below did not err in refusing to quash the service of the citation. For the reason that, in my opinion, the second section of the act of February, 1874 (14th Leg. 31), entitled "an act to fix the venue in certain cases," is unconstitutional. Said section embraces, as I think, a distinct object from that expressed in the title and that provided for in its first section. If this section of this act is constitutional, in my opinion it would operate as an implied repeal of article 4888, Pasch. Dig., under which the service of the citation was made.

See note, p. 525.

THE LAKE SHORE AND MICHIGAN SOUTHERN RY. CO.

v.

PETER LAVALLEY.

(36 *Ohio Reports*, 221. *January Term*, 1880.)

In an action brought by an employee of a railroad company against it, to recover for injury sustained while in the discharge of his duty, the negligence charged was the moving of a car under which the plaintiff was working, without notice or warning. The proof showed that the negligence in not giving notice or warning of the moving of the car was attributable to the foreman under whose control the plaintiff was working and not to those engaged in moving the car.

***Held*, that the case was not one of a failure of proof under section 133 of the Code, but, at most, of variance under sections 131 and 132.**

It is the duty of a railroad company to make such regulations or provision for the safety of its employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties.

A foreman was put in charge of a set of hands, whose business it was to repair freight cars while standing on the track, in the yard of the company in which trains were accustomed to be made up; it was also the duty of the foreman to participate with the hands in doing the work. While the foreman and a hand were engaged in repairing a car, and the latter was at work under the car by the order of the foreman, he was injured by the striking of the car on which he was working by another car moving on the same track. *Held*:

That the hand was the subordinate of the foreman, in respect to the work in which he was engaged at the time he was injured.

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That it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him, while thus engaged, from the danger arising from the switching of cars and the making up of trains on the same track; and for an injury resulting from the want of such care, the company is liable.

ERROR to the District Court of Lucas County.

The cause of action against the defendant below, as alleged by the plaintiff below in his petition, is in substance this:

That the plaintiff, an employee of the defendant, in the performance of his duty and in pursuance of the order of his superiors in such service, was under a car making certain repairs; that it was the duty of defendant, by its agents, to prevent a starting or moving of said car and otherwise to protect plaintiff from danger while so working under said car; and that defendant negligently and wrongfully, by its agents and servants, without any notice or warning to plaintiff, put and continued said car in motion, whereby plaintiff received the injuries complained of.

The answer in substance denies each of these allegations.

The facts of the case, as shown by the testimony set out in the bill of exceptions, are, in substance, as follows:

Lavalley had been employed for nearly three years as a repairer, on the track, of crippled freight cars, at the stock yards of the Lake Shore and Michigan Southern Ry. Co., on the east side of the Maumee river, and about three weeks before he was hurt was transferred to the freight yards at the Air Line Junction, on the west side of the river, to do the same kind of work there. This work consisted of an examination of all freight cars on their arrival, and to repair those he found needing such repairs as could be made on the tracks in the yard. The repair gang consisted of Fox, the foreman, Lavalley and Clark, repairers, and two other men called oilers. It was customary for these men, including Fox, to go out separately and examine the cars in the trains on their arrival. If they found a car needing such repairs as they could make alone, they repaired it; but if they could not make the repairs alone any two of them would go and do the work together. Engines and train men were at work about these yards at all times, engaged in switching cars and making up trains; and in the prosecution of their work it was also customary for these repair men, when alone, and they had to be under a car, to look out for themselves that the car would not be moved; but when two were together it was expected that the one not under the car would watch for the other, and this would be the case whether Fox and one of his men, or two of the men, worked together. At this time the only means the men engaged in switching about the yards had of knowing that a car repairer was at work in any particular locality was by these men telling them when and where they were going to repair a car.

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Afterwards signal flags were used to designate cars that were being repaired.

On the day Lavalley was injured Fox directed Lavalley to pick out a bolt and go with him to repair a car he had found there needing a bolt which would require two men to put in. Fox also picked out another bolt and went with Lavalley to a crippled box freight car. The two worked together in taking out a broken bolt and replacing a new bolt through the floor and in the draw part of the car. While Fox was under the car screwing on the nut he directed Lavalley to take the other bolt and go to another box car, which he pointed out near by, and commence the work of driving out a similar broken bolt and putting in the new one. Lavalley did so, and went under the car for the purpose of driving the old bolt out through the sill and floor of the car. Fox then came over and jumped into this car to assist in completing the work, but not finding the new bolt to be put back asked Lavalley to hand it to him. Lavalley came out from under the car, picked up the new bolt, took off the nut, handed the bolt to Fox, and then returned to his place under the car to screw on the nut after Fox had driven the new bolt down. While Fox was driving the bolt down and Lavalley was putting on the nut, a pony engine, engaged in making up a train, set some cars in motion on this track in such a manner as to cause this car to be moved about half its length, and thereby inflict upon Lavalley the injury complained of.

Neither Fox nor any of his men had any control over the men engaged in making up trains; nor was there any negligence chargeable to the latter in respect to causing the injury in question.

The trial resulted in a verdict and judgment for the plaintiff below.

On error, the judgment was affirmed by the district court; and the present proceeding in error is prosecuted by the company to obtain a reversal of the judgment.

R. & E. T. Waite and James Mason, for plaintiff in error: We insist that the allegation of the claim, to which the proof was directed, being unproven, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within sections 5294 and 5295 of the revised statutes, but a failure of proof. Section 5296 of revised statutes (§ 133, also §§ 131 and 132 of code; S. & C. 989). Dean *v.* Yates, 22 Ohio St. 388, par. 2, page 396; also, Hill *v.* Supervisor, etc., 10 Ohio St. 621, and Thatcher *v.* Heisey, 21 Ohio St. 668.

It is a rule of law now well established in Ohio, that where one servant of a railway company is injured in consequence of the neglect of another servant, between whom, for the time being, no relation of subordinate and superior, in connection with the particular act of negligence complained of, exists, the injured party has no right of action against the company. Little Miami R. R.

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Co. v. Stevens, 20 Ohio, 415; C. C. & C. R. R. Co. v. Keary, 3 Ohio St. 201; Mad River & L. E. R. R. Co. v. Barber, 5 Ohio St. 541; Whaalan v. Mad River & L. E. R. R. Co., 8 Ohio St. 249; Manville v. C. & T. R. R. Co., 11 Ohio St. 417; Pittsburg, F. W. & C. Ry. Co. v. Devinney, 17 Ohio St. 197.

And the question in this issue is whether there existed, at the time this injury was received, such a relation of subordinate and superior between the laborer, Lavalley, and the foreman, Fox, as would render the company liable to Lavalley for the consequences of the asserted negligence of Fox in not keeping a more strict lookout and warning Lavalley in time of the approaching danger.

In this case the testimony shows that Fox was the superior of Lavalley in all matters connected with the order and manner in which the work upon the car should be conducted, but in the matter of keeping watch and lookout for danger that no relation of superior and subordinate existed. Lavalley did not depend upon Fox to look out because he was the foreman, but simply because he was his fellow-laborer in the prosecution of the work about which they were both engaged. It was not the duty of Fox to keep this lookout because he was the foreman, but simply because of that duty which one fellow-laborer owes to another. It is unquestioned but that it would have been just as much the duty of Lavalley to have kept watch while Fox was under the car as for Fox to have done so while Lavalley was there. This was a reciprocal duty the one owed to the other as co-laborers, and not because of any superior relation of the one over the other.

Lee & Brown, for defendant in error:

The negligence of Fox produced the injury. Shearman & Redfield on Negligence, § 10; 8 Bosw. 345; 2 E. D. Smith, 413.

The superior cannot, at one and the same time, be the superior and the common fellow-servant. Railroad v. Stevens, 20 Ohio, 415; Railroad v. Devinney, 17 Ohio St. 210; Berea Stone Co. v. Kraft, 31 Ohio St. 293; Railway Co. v. Lewis, 33 Ohio St. 200; 53 N. Y. 549.

WHITE, J.—The first ground of error relied on is that there was a failure of proof on the part of the plaintiff, under section 133 of the code, and not a variance between the allegations in the petition and the proof, as defined by sections 131 and 132. We regard the case as raising a question of variance merely, within the meaning of the last two sections.

The petition charged that the plaintiff, by the order of his superior, was under a car making repairs; that it was the duty of the defendant, by its agents, to prevent the moving of the car, and otherwise to protect the plaintiff from danger while so working under said car; and that the defendant negligently and wrongfully,

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by its servants and agents, without any notice to the plaintiff, put the car in motion, whereby the plaintiff was injured.

The negligence charged consisted in the failure to notify the plaintiff of the approaching danger, and in the moving of the car without such notice. Both are alleged to have been operative in causing the injury. It is not definitely stated on what servant the duty rested of giving the plaintiff notice; but, if the purposes of the defence required this to be more specifically stated, application should have been made to the court to compel the plaintiff to make the petition definite and certain in this respect. As the case is presented, we think it comes within the principle laid down on the subject of variance, in Huffman *v.* Gordon, 15 Ohio St. 212, 216.

The next ground of error is that the relation of superior and subordinate existing between the foreman, Fox, and the plaintiff below, Lavalley, was not such as would make the company liable for the negligence of Fox in causing the injury in question.

The claim on behalf of the company is that Fox was the superior of Lavalley in all matters connected with the order and manner in which the work upon the cars should be conducted, but in the matter of keeping watch and lookout for danger that no relation of superior and subordinate existed; that in this respect they were merely fellow-servants engaged in a common service, neither having any control or authority over the other.

We do not concur in this view. It was the duty of the company to make such provision or regulations for the safety of its employees as would afford them reasonable protection from the dangers incident to the performance of their respective duties.

In the present case Lavalley, the plaintiff below, was one of a set of hands whose business it was to repair freight cars while standing on the track. The place in which the repairing was required to be done was in the freight yard of the company, in which the freight trains were accustomed to be made up, and where there was a constant switching of cars from one track to another. The services, therefore, required of these hands were peculiarly dangerous; and it was the duty of the company to make reasonable regulations or provision to protect them from the dangers to which they were exposed from moving trains and cars, while engaged in the discharge of their duties.

The hands, under the regulations of the company, were put in the charge of Fox, who, in directing their operations, was the representative of the company. No other provision or regulation seems to have been made for their government or protection. By setting Lavalley to work under the car, where, by the exercise of reasonable care, he could not discover an approaching train or car in time to save himself from injury, it was the duty of Fox to see that reasonable precautions were taken to guard him against such

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danger; and for the injury resulting from such neglect the company is liable. He might have watched, himself, or, if his services were required in the car, he might have required one of the other hands to watch; but he did neither, nor did he adopt any other precautions.

It is said by counsel that if the company is liable to Lavalley, it would likewise have been liable to Fox, if he had been injured under like circumstances. Such conclusion is not warranted. Fox had authority to direct what precautions should be taken to guard against danger. He could have required one of the hands to watch while he was engaged in the work. Lavalley had no such authority. If Fox had chosen to expose himself to the danger, and had neglected to exercise the authority with which he was invested to protect himself from injury, the fault would have been his own.

Judgment affirmed.

See note, p. 525.

THE OHIO AND MISSISSIPPI RY. CO.

v.

COLLARN.

(78 *Indiana Reports*, 261. *May Term*, 1881.)

A complaint against a railroad company for damages to the person of an employee, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its employees, is sufficient on demurrer; and proof may be given thereunder of any acts or circumstances of negligence, on the part of such defendant, in the running of the locomotive causing the injury.

Uncertainty in the allegation of negligence in such complaint is a defect that cannot be reached by demurrer, but by motion to make specific.

On a demurrer to the evidence, the court is bound to take as true all the facts which the evidence tended to prove, and such inferences from them as the jury could fairly have drawn, though the jury might not have drawn them.

While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, engaged in the same general undertaking, it is liable, in such case, where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury.

Generally, where the facts of a case are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury, and this is true in that class of cases where the existence of such facts comes in question, rather than where deductions or inferences are to be made from them; but if, from the facts proven, different minds may draw different conclusions, the case may be properly left with the jury.

Where the engineer of a locomotive places it in the hands of a fireman in-

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competent to manage it, contrary to the rules of the railroad company in whose employ he is, he is guilty of negligence.

A railroad company is guilty of negligence in permitting its order, forbidding firemen to handle its engines, to be violated by its engineers, and retaining them in its employ, after notice of their practice of abandoning their engines to the firemen, which practice led to the placing of an engine in the hands of a careless and incompetent fireman, whereby injury to a co-employee occurred.

Notice to the master mechanic of such company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company.

It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal loss and injuries, and, unless the damages are such as to induce the belief that the jury must have acted from prejudice, partiality or corruption, their verdict ought not to be disturbed.

If one of two paragraphs of complaint is good, the Supreme Court will presume, on appeal, that the court below, on overruling a demurrer to the evidence, applied the evidence to the good paragraph, and not to the bad paragraph.

FROM the Washington Circuit Court.

C. A. Beecher and E. C. Devore, for appellant.

J. B. Brown, S. H. Buskirk, R. Hill and J. W. Nichol, for appellee.

WORDEN, J.—Complaint by the appellee against the appellant in four paragraphs.

Demurrer for want of sufficient facts to each paragraph; sustained as to the first and second, and overruled as to the third and fourth paragraphs, and exception.

Issue on the third and fourth paragraphs, and trial by jury. The defendant demurred to the plaintiff's evidence, and the jury assessed the plaintiff's damages conditionally at $7,000. The court overruled the defendant's demurrer to the evidence, and the defendant moved for a new trial on the ground that the damages assessed were excessive. This motion was overruled, and judgment rendered for the plaintiff for the damages assessed.

Errors are assigned upon the overruling of the demurrers to the third and fourth paragraphs of the complaint, the demurrer to the evidence, and the motion for a new trial. The following is the fourth paragraph of the complaint:

"Fourth Paragraph. The said plaintiff, William Collarn, for further and additional paragraph of complaint, says that said defendant was and is a corporation duly and legally organized under and by virtue of the laws of the State of Indiana, and was and is engaged in the general carrying on and management of a general railroad business between the cities of Cincinnati, Ohio, and St. Louis, Missouri; that the railroad track of said defendant passes through the city of Seymour, and the county of Jackson, in the State of Indiana, and that on the 22d day of July, 1874, the plain-

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tiff was employed by said defendant as a laborer upon the railroad track of said defendant, and as such it was his duty to assist in the repairing, and keeping in good repair, the railroad track of said defendant; that at the same time the said defendant was managing, operating and running locomotive engines of said defendant, on and along, over and upon the railroad track of said defendant; that plaintiff had nothing whatever to do with the management, running or operating of said locomotive engines of said defendant, nor had he any right, power or authority to give any orders or directions in reference to the running, managing or operating of the same; that, on the day and year last aforesaid, plaintiff was, by said defendant, ordered and directed to work upon the said defendant's railroad track in the city of Seymour, Indiana, at repairing the same; that while said plaintiff was so engaged at work for said defendant, in obedience to the orders and directions aforesaid, the said defendant did then and there, carelessly, negligently and recklessly run a locomotive along and upon the railroad track of said defendant; that said defendant, by blowing the whistle of said locomotive, could have given plaintiff warning of its approach, and that plaintiff could have been easily notified thereof and warned of the danger, and it was the duty of the defendant so to do, but, not regarding its duty in this respect, it neglected to give plaintiff any notice of the approach of said locomotive, but that said defendant did run said locomotive carelessly, negligently and recklessly, against, on and upon, and over him the said plaintiff, and by means thereof the said plaintiff then and there had his right leg mashed, bruised and cut off. Plaintiff avers that the injury before stated, which he received, was caused without any fault or negligence on his part, and that he was in no wise guilty of contributory negligence thereto. Plaintiff further avers that the aforesaid injury, received by him in the manner and form aforesaid, and by the means aforesaid, was so great, and of such serious character, that he had to employ a physician and surgeon to amputate his said right leg, and to attend upon him for a period of time of six months' duration, the services of whom are of the value of one thousand dollars, for which said plaintiff is liable and bound to pay, and a portion of which he has already paid; that he was put to great trouble and expense, to wit, the sum of six hundred dollars, in procuring attention and nursing for a long space of time, to wit, six months; that he was thrown out of employment, by reason of which he has sustained damages in the sum of one thousand dollars. Said plaintiff avers that, by reason of said injury, he suffered great pain, and in consequence of said injury he has become wholly unfitted and unable to prosecute his labor and work, and make a living for himself and family. Plaintiff finally avers that, by reason of the foregoing premises, he has sustained damages in the sum of fifty thousand dollars."

This paragraph charges the negligence by which the plaintiff was

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injured directly upon the defendant itself, and not merely upon its employees, and is good upon demurrer for want of sufficient facts. The Indianapolis, etc., R. R. Co. *v.* Keeley's Adm'r, 23 Ind. 133; Hildebrand *v.* The Toledo, etc., Ry. Co., 47 Ind. 399.

An allegation of the paragraph is, that "the defendant did run said locomotive, carelessly, negligently and recklessly against, on and upon, and over him, the said plaintiff, and by means thereof," etc. It is not certain from the allegation, in what the alleged carelessness and negligence of the defendant in running the locomotive consisted; but the defect should have been reached by a motion to make the paragraph more specific. Fultz *v.* Wycoff, 25 Ind. 321; The Cincinnati, etc., R. R. Co. *v.* Chester, 57 Ind. 297; The Brookville, etc., Turnpike Co. *v.* Pumphrey, 59 Ind. 78; The Pennsylvania Company *v.* Sedwick, 59 Ind. 336.

There is no hardship in this rule of pleading. Carelessness and negligence in running the locomotive were directly imputed to the defendant, whereby the plaintiff was injured; and if the defendant had desired a more specific statement of the negligence imputed to it, that end could have been attained by motion.

The mere negligence of a co-employee with the plaintiff, engaged in the same general undertaking, could not be said to be the negligence of the defendant. But the defendant may have been guilty of negligence in knowingly running the locomotive by the agency of careless or incompetent persons. The language of the paragraph is broad enough to admit evidence of this kind. It was said in the case above cited from 47 Ind. 399, that "These are direct charges of negligence against the defendant itself, and are not confined to the negligence of its servants in killing a co-servant, and are broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant."

Indeed, in holding the paragraph good on demurrer, it is necessarily assumed, that under its general allegations proof may be given of any acts or circumstances of negligence on the part of the defendant, in running the locomotive.

We are of opinion that no error was committed in overruling the demurrer to the fourth paragraph of complaint; and, for reasons hereinafter stated, we have not thought it necessary to consider the third paragraph.

We proceed to consider the question arising on the demurrer to the evidence.

There was evidence tending to prove that the plaintiff, at the time of the injury complained of, July, 1874, was in the employment of the defendant, as a track hand, under the direction and control of Thomas McDonald, an employee of the defendant, and that the plaintiff had been in such employment ten or twelve years; that it was the custom of the defendant, upon the arrival of the morning train from Cincinnati, at Seymour, to change engines at

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the latter place, leaving the one just arrived with the train at that place, and taking a fresh engine for the continuance of the route west; that the engine to be left, in order to reach the round-house had to back over some portion of the track that needed new rails; that on the morning of the day of the injury, McDonald directed the plaintiff and some other hands to make preparations for taking up five old rails, at the place indicated, and replacing them with new, so that the work might be done by noon, and for this purpose he directed them, as soon as the train should arrive from Cincinnati, and before the engine should back up to go to the engine-house, a space of time usually of fifteen or twenty minutes, and sometimes more, to go to work and unscrew some of the bolts to the fish-plates fastening the ends of the rails together, so that the rails might be taken up and replaced soon after the engine should pass back to the round-house; that, in obedience to these directions, and before the engine had passed back, the plaintiff and the other hands went to work loosening the bolts and getting ready to remove the rails as soon as the engine should have passed back; that while the plaintiff was thus at work, in a stooping posture, with his face to the east and his back to the approaching engine, it backed up and ran over and crushed his leg, about midway between the knee and ankle joints, making amputation above the knee necessary; that the engine backed up with a speed of from six to twelve miles an hour, without the ringing of a bell or the sounding of a whistle; that, as the engine was backing up, there was a freight train slowly moving out in the opposite direction, on a track near by; that the distance from the point where the engine started to back to the point where the plaintiff was struck was three or four hundred yards, with a slightly up-grade; the track was straight, and there was nothing to prevent the person running the engine from seeing the plaintiff at work upon the track, nor was there anything that prevented the plaintiff from seeing the engine as it approached, if he had looked in that direction; McDonald, the superintendent of that work, was near by when the accident occurred, and called out about the time the plaintiff was struck, but gave no other warning; that, upon the arrival of the train at Seymour, Baker, the engineer, instead of taking the engine to the engine-house, entrusted it for that purpose to one King, his fireman, who was not an engineer, and was not employed by the defendant as an engineer, but only as a fireman, and was not competent to run or take charge of an engine; that some time before the accident occurred, upon the occasion of an engine being run through the round house by the carelessness of some one, an order was made by the company not to allow firemen to handle engines, but it was made the duty of engineers to place their engines in the engine or round-house, and not leave them to the firemen; that this order was adopted along in the spring, before the plaintiff was hurt, and con-

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tinued in force up to that time; that, notwithstanding this order, it was violated by almost all the engineers, who, upon arrival at Seymour, would leave their engines to the care of the firemen, to be placed in the engine-house; that the master mechanic of the defendant, at the time of the promulgation of the order of the defendant prohibiting engineers from trusting their engines to firemen, and at the time of its violation by the engineers, and at the time of the accident, and whose province and duty it was, among other things, to employ, retain, or discharge engineers and firemen, held his office of business at Seymour within two or three hundred feet of the point where the engines were exchanged, and was there frequently upon the arrival of trains; and that, at the time of the injury, the plaintiff had no notice of the habit of the engineers of leaving their engines, upon the arrival of trains, to be taken charge of by the firemen.

"On a demurrer to evidence, everything will be taken against the party demurring which the evidence tends to prove, including every fair inference to be drawn from the evidence." Eagan *v.* Downing, 55 Ind. 65.

"By a demurrer to evidence, all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from these facts." Newhouse *v.* Clarke, 60 Ind. 172.

Applying the law to the case made by the evidence, we may observe, that, while a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, in the same general employment, it is liable, in such case, where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury.

In the case of The Chicago, etc., Ry. Co. *v.* Harney, 28 Ind. 28, this court said, speaking by FRAZER, J.: "Then, again, a master ought to be bound to all the world to employ none but competent and trustworthy servants, so far as reasonable care in their selection can accomplish that end; and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he ought to answer to his other servants for the consequences which may result to them." See, also, Thayer *v.* The St. Louis, etc., R. R. Co., 22 Ind. 26; The Pittsburg, etc., Ry. Co. *v.* Ruby, 38 Ind. 294. The rule, to which numerous authorities are cited, is thus stated in 2 Thompson Neg., p. 974, sec. 4 (2): "If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for

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any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant."

There is some discrepancy in the cases, as to when negligence is a question of law, when of fact, and when compounded of law and fact. The subject is very well elucidated in the case of R. R. Co. *v.* Stout, 17 Wall. 657. There, a child of the age of six years had wandered upon the road of the company, and had got his foot crushed by a turn-table which had been left unsecured and unguarded. He recovered a judgment of $7500 in the circuit court for the District of Nebraska, which was affirmed by the supreme court.

Mr. Justice Hunt, in delivering the opinion of the court, said, upon the subject above mentioned:

"It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the aver-

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age of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding, in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

If the case before us had gone to the jury, that body would have been authorized to determine, under proper instructions if required, as matters of fact, whether, under the circumstances, the plaintiff was himself free from negligence contributing to his injury, and, also, whether the defendant was guilty of the negligence imputed to it.

The court, on the demurrer to the evidence, was bound to take, as true, all the facts which the evidence tended to prove, and such inferences from them as the jury might fairly have drawn, though the jury might not have drawn such inferences.

Now, it seems to us, from all the evidence, that it may be fairly inferred that the plaintiff himself was free from negligence. He was directed to do the work at the time he was doing it. There seemed to be a reason or necessity for commencing the work before the engine passed back, and he, in obedience to orders, commenced it. His back was toward the engine as it approached him. He had no notice that it was in the hands of the fireman, and not the engineer. A freight train was moving out at the same time, the noise of which may have diverted his attention from, and drowned the noise of, the engine as it approached him. He might reasonably have supposed that he would be notified of the approach of the engine, either by the ringing of the bell or the sounding of the whistle.

It needs no argument to show that the engineer was guilty of negligence and a violation of his duty in placing his engine in the hands of a fireman, and one incompetent to manage it, contrary to the orders of the defendant; or that the fireman was incompetent, or culpably negligent in running the engine as stated, without ringing the bell or sounding the whistle, and apparently without taking the trouble to observe whether he had a clear track, or otherwise.

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Now, it may be inferred from the evidence, that the master mechanic of the defendant, whose province it was to employ and discharge engineers and firemen, had ample notice of the practice of the engineers of violating the order of the defendant, by placing their engines in the hands of the firemen; and that the practice led to the placing of the engine in question in the hands of a fireman, incompetent and unfit to manage it. Yet the inference is that no stop was put to the practice, nor were any engineers discharged in consequence of it. Notice to the master mechanic, clothed by the company with such powers, was notice to the company, and his act in thus permitting the order to be violated, and the engineers to thus consign their engines to the firemen, must be deemed the act of the company. This view is fully sustained by the authorities.

In the case of The Pittsburg, etc., Ry. Co. *v.* Ruby, 38 Ind. 294, 322, Downey, J., speaking for the court, said: "We think that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation, and we do not see any reason why this rule is not applicable here. . . . As it was the duty of the master of transportation to communicate all matters concerning his agency to his principal, it may be presumed that he did so. But, whether he did so or not, notice to him is notice to his principal, when it relates, as it did here, to the business which he was transacting for the company. He was placed in his position that he might make himself acquainted with the conduct of those who were placed under his direction and control, and he seems to have had the power to appoint and remove, promote and degrade, those who were engaged in the business of which he had oversight."

In Baulec *v.* The New York, etc., R. R. Co., 59 N. Y. 356, it is said that "when the master is a corporation, necessarily acting by and through agents, the acts of its general agents charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment."

The case of Harper *v.* The Indianapolis and St. Louis R. R. Co., 47 Mo. 567; S. C., 4 Am. Rep. 353, was, in many of its features, much like the present. See, also, 2 Thomp. Neg. 1028, sec. 34; Patterson *v.* Pittsburg, etc., R. R. Co., 76 Pa. St. 389; S. C., 18 Am. Rep. 412.

It is clear enough, from the evidence, that the defendant was guilty of negligence in permitting its order, above mentioned, to be violated by its engineers, and in retaining them in its employment, after notice of their practice of abandoning their engines to the firemen, which led to placing the engine in question in the hands of a careless fireman, incompetent to manage it, whereby the in-

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jury to the plaintiff occurred. The company may well be said, in general terms, to have been careless and negligent in running the engine, by means of the careless and incompetent person thus placed in charge for that purpose. No error was committed in overruling the demurrer to the evidence.

We do not feel authorized to disturb the judgment on the ground that the damages assessed were excessive.

What was said by Kent, C. J., nearly seventy years ago, in the case of Coleman *v.* Southwick, 9 Johns. 45, on p. 51, is as much the law now as it was then. He said: "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot consistently with the precedents interfere with the verdict. It is not enough to say, that in the opinion of the court the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries."

Considering the physical and mental suffering which the plaintiff must have endured, and the dismembered condition in which he must pass the residue of life, together with the chances of his general health being impaired and his life shortened by the accident, we cannot say that the damages were excessive.

There remains but one further point to be considered, which relates to the ruling of the court on the demurrer to the third paragraph of complaint. We think it entirely immaterial whether that paragraph was good or bad; and, if bad, that no harm was done the defendant by the ruling on the demurrer. That paragraph might be entirely eliminated from the record, and the judgment be sustained. Conceding the paragraph to be bad, no verdict was found upon it, nor does the judgment necessarily rest upon it. If the jury had passed upon the evidence, they might have found for the plaintiff on the fourth paragraph only; and, in that event, the ruling on the cemurrer to the third would have been of no importance, and could have done no harm. The jury, had they passed upon the matter, might well have found for the plaintiff on the fourth paragraph, for the evidence warranted such verdict. If the third paragraph was not good, it may be presumed that the court below, on overruling the demurrer to the evidence, applied the evidence to the good paragraph, and not to the bad one.

The case is entirely unlike those where there are several paragraphs of complaint, some good and some bad, but all held good on demurrer, and there is a general verdict for the plaintiff, and nothing in the record to show that it was based on the good para-

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graphs. See Schafer v. The State ex rel., 49 Ind. 460; The Pennsylvania Co. v. Holderman, 69 Ind. 18, and cases there cited. In such cases the court cannot say that the error in holding the bad paragraphs good was harmless, because it cannot say that the evidence supported and made out the good paragraphs, and entitled the plaintiff to verdict and judgment thereon, as if the bad paragraphs had not been in the record; all of which appears in the case before us.

The judgment below is affirmed, with costs.

It having been made to appear that since the submission of this cause the appellee has departed this life, it is ordered that the judgment herein be rendered as of the term at which the cause was submitted.

See note, p. 525.

ALICE McCOSKER, Administratrix, etc., Respondent,

v.

THE LONG ISLAND R. R. Co., Appellant.

(84 *New York Reports*, 77. *February* 8, 1881.)

McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yard master L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signalled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yard master was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable.

McCosker v. L. I. R. R. Co. (21 Hun, 500), reversed.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made July 1, 1880, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 21 Hun, 500.)

This action was brought to recover damages for alleged negligence causing the death of John McCosker, plaintiff's intestate.

These facts were stipulated on the trial:

"First. That John McCosker, plaintiff's intestate, was, at the time of his death, in the employ of the defendant as a driller in and about the defendant's yard at Hunter's Point. That the

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duties of said McCosker as such driller were to assist in the making up of trains, and the distribution of cars in and about the said yard and repair shops of the defendant.

"Second. That said McCosker had been hired by and was under the immediate supervision and control of Rodney W. Luke, the yard master.

"Third. That the duties of said Luke included the hiring and discharging of drillers, the making up of trains, and the distribution of cars in and about the said yard and the repair shops of the defendant, and that said McCosker and others were employed by the defendant to assist said Luke in said duties. That the immediate superior of said Luke in the service of the defendant was the train dispatcher, whose orders and instructions said Luke was at all times bound to obey, and who was under the control of the general superintendent of the defendent.

"Fourth. That on or immediately prior to the 25th day of May, 1877, a certain caboose car was brought into the yard from some point on defendant's railroad, having the bumpe rupon its easterly end so broken that it could not be coupled to another car by the ordinary method. That said Luke having on the day aforesaid received instructions from defendant's repair shop to send said car to said shop (which was situate in defendant's yard at Hunter's Point) for repairs to said bumper, instructed McCosker and another driller to assist him, the said Luke, therein; that said car was then standing at or near the westerly end of one of the tracks in said yard; within a few feet to the easterly and upon the same track stood four cars coupled together, but detached from the car with the broken bumper; these were flat cars about four feet high above the rail; and still farther to the easterly, upon the same track, stood a train of ten flat cars, each of the height aforesaid, and having an engine attached thereto at the easterly end, facing easterly. That said Luke instructed said McCosker and another driller to take a chain and attach the same to the said broken bumper, and also to the car standing next easterly thereof, in order that said broken car might be hauled to the repair shop. That while the said McCosker and the other driller were so engaged the said Luke, who was standing near the engine, signalled the engineer to back his train. That the said engineer thereupon, without signal or warning, backed the said engine and train in a westerly direction in such manner that the rear car of said train struck against the four detached cars, and forced the car next easterly of the car with the broken bumper backward upon and against said McCosker, so that he was crushed between said two cars last mentioned and sustained injuries, from which he subsequently died on the 5th day of June, 1877. That the said injuries were sustained at about half past eleven o'clock in the morning of the 25th day of May, 1877.

"Fifth. That said Luke knew of the broken bumper before he

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gave the order to deceased, that the said defect was patent and noticeable to any one familiar with railroad cars."

The defendant moved that the complaint be dismissed, on the following grounds:

"First. That the acts of the yard master Luke, so far as they tended to cause the injury, were those of a fellow-servant with the deceased, for which defendant is not liable.

"Second. That there is no evidence of any failure to perform the duties which defendant owed to said deceased, either on its part or on the part of any person to whom it had delegated the performance of such duties.

"Third. That plaintiff had failed to establish a cause of action against the defendant."

The court denied the motion and the defendant duly excepted.

Edward E. Sprague, for appellant. The test of the master's liability is the character of the act, in the performance of which the injury arises. (Crispin *v.* Babbit, Ct. App., Sept. 21, 1880; Rose *v.* B. & A., 58 N. Y. 217, 220; Farwell *v.* B. & W. R. R., 4 Metc. 49; Corcoran *v.* Holbrook, 59 N. Y. 517; Eagan *v.* Tucker, 18 Hun, 347.) Defendant was bound to use due diligence in providing proper and sufficient tools, machinery and apparatus for the use of servants and in employing fellow-servants, competent and sufficient in number, and in discharging such as he knows, or ought to know, to be incompetent. (Wright *v.* N. Y. C., 25 N. Y. 562, 565; Flike *v.* B. & A., 53 id. 549, 553; Keegan *v.* Western R. R., 8 id. 175; Ryan *v.* Fowler, 24 id. 410; Plank *v.* N. Y. C., 60 id. 607; Mehan *v.* S. B. & N. Y., id. 615; Manning *v.* Hogan, 78 id. 615; Kirkpatrick *v.* N. Y. C., 79 id. 240; Gage *v.* D., L. & W., 14 Hun. 446; Cone *v.* D., L. & R. W., 15 id. 172; Hawley *v.* North. Cent., 17 id. 115; Connolly *v.* Poillon, 41 Barb. 366; Spelman *v.* Fisher Iron Co., 56 id. 151; Laning *v.* N. Y. C., 49 N. Y. 521; Brickner *v.* N. Y. C., 2 Lans. 586; Sprong *v.* B. & A., 58 N. Y. 56; Booth *v.* B. & A., 73 id. 38; Harney *v.* N. Y. C., 19 Hun, 556; Heiner *v.* Heuvelman, 45 N. Y. Supr. 88.) Errors in starting trains are not imputable to the corporation as master. (Rose *v.* B. & A., 58 N. Y. 217, 221; Wright *v.* N. Y. C., 25 id. 562; Haskin *v.* N. Y. C., 65 Barb. 129, 134; 56 N. Y. 608.) The yard master's act in signalling the engineer had no relation whatever to his authority to hire and discharge. (Crispin *v.* Babbit, supra; Barringer *v.* D. & H. C. Co., 19 Hun, 216.) The yard master and plaintiff's intestate were co-employees. (Laning *v.* N. Y. C., 49 N. Y. 528; Feltham *v.* England, L. R., 2 Q. B. 33; Wilson *v.* Merry, L. R., 1 Scotch App. 326; Barringer *v.* D. & H., 19 Hun, 216; Searle *v.* Lindsay, 11 C. B. [N. S.] 429; McMahon *v.* Henning, 11 Rep. No. 2, p. 42; M. & M. R. R. *v.* Smith, 6 Rep. 264.)

Clifford A. H. Bartlett, for respondent. A person, to whom a corporation delegates executive duties, the appointment and dis-

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missal of laborers and employees, stands in the place of the corporation and is not a co-servant. (Shearman & Redfield on Negligence, § 103; Wharton on Negligence, §§ 222, 223, 235; Thompson on Negligence, vol. 2, p. 1030; Besel *v.* N. Y. C. & H. R. R. R. Co., 70 N. Y. 171, 175, 176; Flike *v.* Boston & Alb. R. R., 53 id. 553; Laning *v.* N. Y. Cent., 49 id. 533; Brickner *v.* N. Y. C. R. R., 2 Lans. 517; affirmed, 49 N. Y. 672; Malone *v.* Hathaway, 64 id. 9; Bradley *v.* N. Y. C. R. R., 62 id. 99; Booth *v.* B. & A. R. R., 74 id. 40; 22 Alb. L. J., No. 3, p. 54; id., No. 22, p. 483; Eagan *v.* Tucker, 18 Hun, 348–349; Fort *v.* Whipple, id. 591.) A corporation is liable to its servant for any injury happening to him in furnishing implements and facilities improper and unsafe for the purposes to which they are to be applied. (Spelman *v.* Fisher Iron Co., 56 Barb. 155–165; Le Clare *v.* The First Division of the St. P. & P. R. R., 20 Minn. 9; Stoddard *v.* St. Louis, K. City & N. R. R., 65 Mo. 520; Dobbin *v.* Richmond & Danville R. R. Co., 81 N. C. 547; Deveny *v.* Vulcan Iron Works, 4 Mo. 236; Mullen *v.* Philadelphia & Southern Mail Steamship Co., 78 Penn. St. 26, 32; Whalen *v.* The Centenary Church, etc., 62 Mo. 326; Gormley *v.* Vulcan Iron Works, 61 id. 492; Railway Co. *v.* Leus, 33 Ohio, 200; Railroad Co. *v.* Keary [1854], 3 Warren & Smith [Ohio], 209, 210; Railway Co. Fort, 17 Wall. 559; Ford *v.* Fitchburg R. R., 110 Mass. 260; Hough, etc., *v.* The Texas & Pac. R. R., 10 Otto, 213.) Where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. (Chicago & N. W. R. R. *v.* Bayfield, 37 Mich. 213; Berea Stove Co. *v.* Craft, 31 Ohio, 292; Brabbits *v.* Chicago & N. W. R. R., 38 Wis. 289.) The yard master, Luke, stood in the place of the company pro hac vice. (Smith *v.* Chicago, Mil. & St. P. R. R., 42 Wis. 526; Ford *v.* Fitchburg R. R., 110 Mass. 240.)

FINCH, J.—The doctrine established by our decision in Crispin *v.* Babbitt (81 N. Y. 516) is fatal to the plaintiff's claim. The yardmaster, through whose negligence the injury occurred, must be deemed to have been a fellow-servant of the deceased, as to all acts done within the range of the common employment, except such as were done in the performance of some duty which the master owed to his servants. The act, in the present case, was very plainly not of that character. The yardmaster was charged with the duty of making up the trains and distributing the cars in and about the yard, and the repair shops of the defendant, and the deceased was employed by him to assist in that service. As a necessary consequence, broken and disabled cars had to be handled and moved to the repair-shops, and what ever of risk was inseparable from their damaged condition, and the inconvenience, and even danger, of getting them to the shops was an open and palpable

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risk of his employment, which the deceased assumed. It is, of course, no ground of liability of the company that the bumpers of this car were broken, and it could not be coupled in the ordinary way. The deceased was employed to handle and move to the repair-shops damaged and disabled cars, and took the risk of his employment in that respect. While engaged in attaching the broken car to the one in front with the aid of a chain, and by direction of the yardmaster, the latter negligently, and at the wrong moment, signalled to the engineer to back his train, and as a consequence the deceased was crushed between the cars. The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair-shop. What the yardmaster was doing was the work of a servant, in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yardmaster from the negligent performance of which the injury resulted. The question of liability was distinctly raised upon a motion for a nonsuit, based upon the grounds that the acts of the yardmaster, so far as they tended to cause the injury, were those of a fellow-servant with the deceased, and that there was no evidence of any failure to perform the duties which defendant owed to deceased, either on its part or on the part of any person to whom it had delegated the performance of such duties. The motion should have been granted, and its denial was error, for which the judgment should be reversed.

All concur, except Danforth, J., not voting, and Rapallo, J., absent.

Judgment reversed and new trial granted, costs to abide the event.

See note, p. 525.

JEFFREY

v.

KEOKUK AND DES MOINES R. R. CO.

(*Advance Case, Iowa. October* 4, 1881.)

Plaintiff was employed as a shoveler upon a construction train, and while going to the rear end of the train in discharge of his duty, was by reason of the uncoupling of the caboose by the conductor, and a sudden jerk of the train caused by the engineer, thrown from the car and run over by the caboose. *Held*, that the evidence was sufficient to sustain the verdict of the jury to the effect that the injury was caused by the proximate neglect of con-

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ductor and engineer, and that plaintiff was not guilty of contributory negligence.

Certain special interrogatories propounded to and answered by the jury, as to whether the accident was caused by the joint acts of the conductor and engineer, *held*, to submit but a single proposition.

Admission of certain evidence upon re-examination, as to whether, after signal was given, plaintiff thought of catching hold of a stake to save himself, *held*, error without prejudice; Rothrock, J., regarding it as admissible, as being matter gone into upon cross-examination.

Evidence tending to show that cutting the train in the manner pursued was unusual, *held*, competent.

A witness called to testify as to the customary manner of cutting trains and side-tracking cars cannot testify as to the propriety of either way.

Certain instructions to the effect that if defendant saw the signal to cut the train, and knew his position was dangerous, and made no effort to save himself from injury, he was guilty of contributory negligence, but omitting all reference to the fact as to whether he had time, after knowing his danger, to protect himself, *held*, properly refused.

A person may sometimes voluntarily and without actual necessity, place himself in a dangerous position, and still not be guilty of contributory negligence; and question of contributory negligence in this case was one for the jury to determine, in view of all the circumstances of the case.

Certain instructions *held* properly refused as not applicable to any of the issues of the case.

APPEAL from Lee circuit court.

This is an action at law to recover damages which it is alleged the plaintiff sustained while in the employment of the defendant, by being run over by a car through the negligence of certain co-employees. The petition and answer are in the usual form, the plaintiff claiming that he was injured by reason of negligence in the persons having charge of said train, and averring due care on his part; and the defendant denying such negligence and pleading contributory negligence upon the part of the plaintiff. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for $5,500. Defendant appeals.

Gilmore & Anderson, for appellants. Craig & Collier, for appellee.

ROTHROCK, J.—1. The main facts attending the accident are not in dispute. They are as follows: The plaintiff entered the service of the defendant on the tenth day of July, 1876, as a shoveler on a construction train having its headquarters at Summit station. On the twenty-sixth of August, 1876, this construction train was being employed in hauling dirt to certain places west of Summit station, and, as was its custom, it was coming into the station to lay up for the night. The train consisted of an engine and tender, and a way car and some ten or twelve flat cars. There were about forty laborers working on said train. There were two tool boxes, with a passage-way between them, on or near the rear end of the last flat car, and next to the way car. The way car had a door in the end next to the cars with the tool boxes. The train usually started from

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the dump about the time, or before, all the dirt was thrown from the cars, and as soon as the dirt was all removed the men walked along the train while it was in motion, deposited their tools in the tool boxes, and went into the way car to get their dinner buckets and any of their clothing which might be there, and then they usually returned to the front of the train next the locomotive, so that they could get off opposite their boarding-house. On the evening of the accident the plaintiff went back to the rear of the train for the purpose of getting his coat and dinner bucket. When he reached the rear of the last car, and was near the tool boxes, Mike O'Neil, the conductor of the train, was standing in the door of the caboose. The speed of the train was slackened somewhat, and O'Neil stopped one Coffey, who was in front of the plaintiff and about entering the way car, and warned him off. O'Neil stopped and pulled the pin which coupled the way car to the train, and raised up and signalled the engineer, who put on steam, which increased the speed of the train, suddenly producing a jerk, by reason of which the plaintiff and another of the employees fell in the opening made in the train by the uncoupling and increased speed, and were run over by the caboose. One of the plaintiff's legs was broken and crushed in such a manner as to require amputation above the knee, and he was otherwise injured. The other employee who fell from the car at the same time was killed.

The theory of the plaintiff is that the conductor was negligent in uncoupling the cars and giving the signal to the engineer, and that the engineer was negligent by putting on too much steam, suddenly producing a violent jerk which threw him from the car. Counsel for the defence contend that the plaintiff was guilty of contributory negligence by standing within from three to five feet of the end of the car, knowing that the conductor pulled the pin and made the signal, and knowing that the man who was in front of him had been warned of the danger, and by carelessly standing still without attempting to avoid injury to himself by any means whatever. At the instance of the plaintiff the court submitted to the jury certain special interrogatories which, with the answers thereto, were as follows:

(1) Were the conductor and engineer on defendant's train guilty of negligence which was the proximate cause of the injury? Ans. Yes.

(2) Did O'Neil see Jeffrey on the tool car before he (O'Neil) pulled the pin between the way car and the tool car? Ans. Yes.

(3) Did O'Neil know where Jeffrey was standing on the tool car at the time he gave the signal to the engineer to go ahead? Ans. Yes.

(4) Did O'Neil or the engineer give Jeffrey any warning which was reasonably sufficient to have put him on his guard against what followed? Ans. No.

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(5) Was it the act of the conductor and engineer that put Jeffrey in a place of danger? Ans. Yes.

(6) Did O'Neil see Jeffrey's position on the tool car in time to have avoided the injury to him by exercising ordinary care? Ans. Yes.

(7) If you answer the sixth question "Yes," then answer the following question: Did O'Neil, after seeing Jeffrey's position on the tool car, exercise ordinary care and precaution to avoid injuring him? Ans. No.

Certain interrogatories were also submitted to the jury at the instance of the defendant, which, with the answers, are as follows:

(1) How near the rear end of the tool car was the plaintiff standing at the time he fell off? Ans. From three to five feet.

(2) Was not he standing too near the end of the tool car to be reasonably safe at the time he fell off? Ans. No.

(3) Was he not, at the time he fell off, standing so near the end of the tool car that his position was evidently dangerous, in case the speed of the car he was on was increased in an ordinary degree, unless he held on to something, or braced against the start? Ans. No.

(4) Did plaintiff make any efforts at all to secure himself against a forward movement on the car on which he stood? Ans. No.

(5) If he did make such efforts, what were they? Ans. No effort.

(6) Did plaintiff see the conductor pull the pin? Ans. Yes.

(7) How much time elapsed after the conductor pulled the pin, and before the speed of the tool car was increased? Ans. About five seconds.

(8) Was plaintiff exercising ordinary and reasonable care for his own safety after he saw the pin pulled, and up to the time he fell off? Ans. Yes.

(9) Was what plaintiff saw the conductor do and heard him say in the way of uncoupling, giving warning and signal, reasonably sufficient to put plaintiff on his guard against what was likely to follow? Ans. No.

(10) Does the evidence show that plaintiff's injury was in consequence of the negligence of any of the employees of the company? Ans. Yes.

(11) If you say it was, then which one was it? Ans. Conductor and engineer.

(12) In what particular things did such negligence consist, if you say there was such negligence? Ans. In cutting train in two while in motion and unusual jerk.

(13) Did not plaintiff know as much about what was going to happen after the signal to go ahead was given as O'Neil did? Ans. No.

(14) If you have answered that the injury was in consequence of

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the negligence of the conductor, then state in what such negligence consisted. Ans. In cutting train in two while in motion.

(15) If in consequence of the negligence of the engineer, then state in what such negligence consisted. Ans. By giving an unusual jerk.

(16) Did not the conductor, after giving the warning and signal he did give, and knowing that plaintiff saw what he was doing, have reasonable cause to believe that plaintiff could and would secure himself from ordinary jerk of the train? Ans. No.

(17) Is it ordinary prudence, for a man with plaintiff's experience about trains, to stand the distance he was from the rear of a car about to be cut off, under the circumstances this car was? Ans. Yes.

(18) Did the plaintiff see and understand the signal to go ahead? Ans. Yes.

(19) Did he have reasonable cause to know, from anything he saw or heard, that the car on which he stood was about to be separated from the car next behind him? Ans. Yes.

Questions 1, 4, and 5, propounded at the instance of the plaintiff, were objected to by the defendant because each was in fact composed of two questions. The objection urged is that each question joined the acts of the engineer and conductor, and required the jury to answer whether by their joint negligent acts the accident happened. The questions, it appears to us, submit a single proposition; and, although they embrace the acts of two of defendant's employees, they are still a single question. They are not such as tend to confuse a jury by requiring them to draw a conclusion from many facts. Further than this, the jury appear to have fully comprehended the questions, as will appear by the answers to interrogatories 10 and 11, propounded at the instance of the defendant. The attention of the jury was there directed to the same subject, and they distinctly and plainly answer that plaintiff was injured in consequence of the negligence of the conductor and engineer.

2. The defendant moved the court to set aside the verdict because the same was against the evidence, and because the answers to certain of the special findings were the result of prejudice, and were not sustained by the evidence, and for judgment for the defendant upon the special findings. These motions were overruled by the court. The motion for judgment for the defendant on the special findings was correctly overruled, for the simple reason that the answers to the special interrogatories do not show affirmatively that the defendant is entitled to judgment. In regard to the special interrogatories submitted to the jury in this case, we deem it proper to say that the court would have been fully justified in refusing to submit many of them to the jury. It is not the purpose of the statute authorizing this practice to permit parties to submit

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a lengthy cross-examination of the jury upon every conceivable fact in the case, whether it be proximate or remote to the main inquiry. Such a procedure tends only to confusion. The questions propounded are framed from the standpoint of the party propounding them, and are often (unintentionally it may be) unfairly put.

It is urged by counsel for the defendant that the special findings of the jury are inconsistent with each other, and that the answers to questions numbered 3, 8, 9, 13, 16, and 17 are so wanting, in support from the evidence, as to be "absolutely astounding." It is not our purpose to discuss these findings separately. We have carefully examined the evidence, which is fully presented in the record, and in addition to what has already been given as conceded facts in the case, we will, without going into the testimony of the witnesses in detail, recite certain other facts which we think the jury were fairly warranted in finding from the evidence. When Jeffrey, the plaintiff, started for the rear of the train, on the evening of the accident, he was acting under the orders of those in charge of the train. The men were required to deposit their tools in the tool boxes and get their coats and buckets from the way car while the train was in motion. When he reached the tool boxes a man in front of him was about to step into the way car, and Jeffrey heard the conductor, O'Neil, say to him, "Stand back; do you want to get killed?" accompanying these words with an oath; and Jeffrey testified, "and I stopped where I was." Just as O'Neil said that he pulled the pin, raised up, and the train was off with a sudden jerk, and Jeffrey was thrown from his feet and off the car. The jury were, therefore, warranted in finding that up to the time when the plaintiff heard the warning to the man in advance of him he was not only not negligent, but was acting under orders.

Next, it is proper to consider the manner in which the way car was detached from the train. It appears that the uncoupling was made while the train was in motion, and the way car allowed to follow the train to save time in side-tracking the train on one switch, and the way car and engine on another. And here it will be observed that the jury find in answer to the fourteenth and fifteenth interrogatories propounded by the defendant that the negligence of the conductor consisted in cutting the train in two while it was in motion, and that the negligence of the engineer consisted "in giving an unusual jerk." It may well be inquired, why was it necessary to cut the train in two while in motion, and what emergency was there that prevented the brake from being applied on the way car, and why should the engineer give the train a sudden jerk without any signal when there were some 40 men on it whose duty required them to be passing from one end of the train to the other? One witness who was standing near the train testified that there was a terrible jerk in the train. Another says: "All at once I heard a

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tremendous jerk. It was an unusual bump or jolt. I didn't hear any gradual taking up of slack." Another testified as follows: "This was a big sound; it was a severe bump at one surge, as I noticed it. I did not notice anything gradual about it." Another witness testified to the effect that the whole transaction, including the pulling of the pin, the signal, the unusual jerk, and the falling of the men upon the track, was very suddenly done. One witness says he never knew the train to start so hard without ringing the bell or giving warning. Another states that the "jerk almost instantaneously followed the signal." But we have given enough to demonstrate that there was evidence which fairly warranted the jury in finding that the conductor and engineer were chargeable with negligence.

It is urged, however, that the plaintiff was chargeable with contributory negligence, because he heard the warning to the man in front of him, saw the conductor pull the pin and give the signal, and knew that the speed of the train would be increased, and that there would be danger in standing from three to five feet from the end of the tool car without taking hold of the locks or hoops on the tool boxes, or some stakes or standards which were in reach. But there is nothing in all the evidence to charge the plaintiff with notice of the unusual jerk which followed the signal, or to advise him that precautions against it were necessary. He had the right to assume that the forward movement of the train would be made in the usual manner. Much of the argument of counsel is directed to what the plaintiff might have done to save himself from injury in the five seconds which the jury found intervened between the pulling of the pin and the jerk of the train. The jury have found that he was guilty of no negligence which contributed to the injury, and, under all the circumstances surrounding the plaintiff, taking into consideration the exceedingly brief space of time intervening, and the suddenness and violence of the jerk, which plaintiff had no reason to apprehend, we are not prepared to say that the verdict should be disturbed under the well-known rule prevailing in this court. It will be understood that in reciting the foregoing facts we are giving only that phase of the case favorable to the plaintiff. That there was much testimony contradictory thereto is not to be denied. But our inquiry is, was the jury justified in finding as they did? We think they were, and that their verdict is fairly supported by the evidence.

3. The plaintiff was examined as a witness in his own behalf. Upon his re-examination he was asked by his counsel this question: "State whether or not, after O'Neil gave the signal, it occurred to your mind that there was a stake behind the tool box." Another similar question was asked as to whether or not it occurred to his mind that there was a padlock on the tool box. Both of these questions were answered in the negative. The questions and

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answers were objected to by the defendant, and the objections were overruled. It is insisted that whether or not plaintiff thought of the means at hand by which he might have protected himself from injury, is not the standard of care which was required of him. We are united in the opinion that there was no prejudicial error in permitting this evidence to go to the jury. The writer hereof is of the opinion that the defendant was precluded from objecting thereto, because in the cross-examination the plaintiff had been fully interrogated by counsel for defendant in regard to the stake and the padlock, and what he thought when O'Neil stooped and pulled the pin. As the defendant's counsel took it upon himself to cross-examine as to the operations of the plaintiff's mind at the time of, or immediately preceding, the accident, an objection to the same line of evidence upon the re-examination of the plaintiff was correctly overruled. 1 Greenl. Ev. § 468.

A majority of the court, however, are of the opinion that the evidence in question was inadmissible upon the ground that it was not competent for the plaintiff to exculpate himself from negligence by showing his own forgetfulness, but that under the circumstances of this case the defendant was not prejudiced thereby; that the plaintiff was not called upon to guard against a danger which he had no reason to apprehend. The accident arose from being jerked off the car. If he had no reason to apprehend such accident it cannot be said that it was the plaintiff's duty to seize the stake or lock upon the tool box; and it not being his duty it was wholly immaterial whether he thought of them or not. The special findings of the jury show that they never reached the question as to such duty. They found in answer to the second special interrogatory that the plaintiff was not standing too near the end of the tool car to be reasonably safe, at the time he fell off. This means, of course, so far as he had reason to apprehend. Again, they found, in answer to the third special interrogatory, that the plaintiff's position so near the rear end of the car, and without holding on to anything, was not evidently dangerous, upon the supposition that there was to be a mere ordinary increase of speed.

For answer to the fifteenth special interrogatory they found that there was such increase of speed as to result in an unusual jerk. In answer to the seventh special interrogatory they found that the plaintiff did not have sufficient warning to put him on his guard against what was likely to follow when he saw the pin pulled. This shows clearly that he did not have reason to apprehend the danger to which he became exposed. It is wholly immaterial, then, whether he had in mind the stake or the lock upon the tool box. He could most certainly have made a forward movement a step or two and secured his safety completely. Yet the jury found that he was excusable. This must have been upon the sole ground that he had no reason to think it necessary. If this was so, he had no rea-

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son to think it necessary to take hold of the stake or lock. Upon this reasoning the majority of the court think that, though the evidence was not properly admissible, it was not prejudicial.

4. Next it is urged that the court erred in permitting an answer by a witness to the following question: "How often had you seen O'Neil cut that car off while the train was in motion, and in the evening when they were running into the station to put up for the night?" The answer was, in substance, that the witness might have seen it done about twice, probably. This evidence was not incompetent. The theory of the plaintiff was that it was unusual to cut off the way car in that manner, and there was evidence tending to show that the plaintiff had not been in a situation to see it done. It was perfectly proper to show that the act of which plaintiff complained was unusual.

5. Thomas Reilly, a railroad conductor, was examined as a witness, and stated: "If I were going to cut a freight train in two and run the engine and caboose on a side track, I would first cut the train off in front of the caboose, then I would put the flat cars on the side track, then run back with the engine and get the caboose and take it where I wanted it. *There would be no impropriety in cutting off the caboose while it was in motion.*" The last sentence, which we have indicated by italics, was stricken out on motion of the plaintiff. The ruling of the court was unquestionably correct. It was proper for the witness to state the customary manner of separating and side-tracking the cars, but the propriety of any given method was a question for the jury, after having all the facts and circumstances before it. The conclusion or judgment of the witness upon the question of cutting a train in two while in motion was not proper as expert testimony. Hamilton *v.* D. V. Ry. Co., 36 Iowa, 31; Muldonay *v.* I. C. R., id. 462; Belair *v.* C. and N. W. R., 43 Iowa, 662.

6. The court, upon its own motion, gave to the jury 36 instructions, which appear to cover every conceivable question in the case. None of these instructions, excepting two, are claimed to be positively erroneous. It is urged, however, that they are general, and only contain specific facts favorable to the plaintiff. The defendant asked the court to give to the jury 50 instructions. They were all refused. It is urged that the court erred in refusing to give the fourth of said instructions, which is as follows: "If it appears that the plaintiff, without any necessity for so doing, voluntarily left a place of safety in the front or centre of the train and went to the rear of the tool car, and while standing there saw and understood that the conductor was about to cut the way car off from the one on which plaintiff was standing, and knew what the effect would be, and that his position would be rendered dangerous thereby, and yet made no effort to secure himself from injury, such conduct would render him guilty of contributory negligence." This instruction

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was properly refused. If it had been given, and the facts therein recited had been found by the jury to have been established by the evidence, there must necessarily have been a verdict for the defendant. But the instruction omits one important fact which is again and again referred to in the evidence, and that is whether or not the plaintiff had time after he became aware of the danger to save himself from injury. The same may be said of the fifth instruction asked and refused. See McNamara *v.* Drott, 40 Iowa, 413.

7. The fourteenth instruction asked and refused was as follows: "If plaintiff voluntarily or unnecessarily placed himself in a dangerous position, and was injured thereby, he cannot recover. Counsel in argument submits this instruction to us with the single remark "that it is a proper statement of the case." We think the court correctly refused the instruction, because a party may voluntarily and without actual necessity expose himself to danger and still not be chargeable with contributory negligence. That he was on the rear of the tool car of his own will, and without any actual necessity to be there, may be conceded, and still he may have been in the discharge of his duty as an employee of defendant.

8. The sixteenth instruction asked and refused was as follows: "The standing or being within two or three feet of the rear end of a flat car without being secure against jerks usual and incident to the handling of such cars while the train was in motion, is of itself negligence; and if you find that plaintiff voluntarily placed himself in that situation, your verdict must be for defendant." The eighteenth instruction was in substance the same. The refusal to give them to the jury is assigned as error. These propositions, like instruction No. 14, in effect state the rule to be that if plaintiff was in a dangerous position he cannot recover. It was for the jury to determine the question of contributory negligence in the light of all the facts and circumstances surrounding the plaintiff at the time of the accident, and not from the mere fact of plaintiff being in a dangerous position, although he may have been in such position voluntarily.

Lastly, it is urged that the court erred in refusing to give the twentieth instruction asked by defendant. It is as follows: "It is claimed by plaintiff's counsel in argument that, although plaintiff himself was negligent, yet that the conductor, O'Neil, saw his dangerous position, and by the exercise of ordinary care could have avoided the injury; and, if he failed to exercise such care, plaintiff could nevertheless recover. The court instructs you no such issue is made in the case, and the failure of O'Neil to do so would not render defendant liable if the plaintiff was himself negligent." In the state of the record before us we do not deem it proper to determine the question argued by counsel as to the necessity of pleading specially the facts necessary to recover where it is found that the plaintiff was negligent, but that such negligence should

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not be imputed to him because the employees of defendant failed to exercise proper care to avoid the injury after discovery of plaintiff's negligence. If it should be held that such special pleading was necessary, the refusal to give the instruction asked, and the giving of the converse of the proposition by the court, was error without prejudice. The jury in their deliberations did not reach that question, but, on the contrary, they expressly found that the plaintiff was without fault or negligence. Having thus found, the question as to plaintiff's negligence and defendant's fault thereafter did not become a part of the case, and the giving of the instruction complained of, and the refusal to give that asked, could not have been prejudicial to the defendant.

Affirmed.

See Missouri Pacific R. R. Co. v. Haley, infra.
See note, p. 525.

HOWLAND
v.
MILWAUKEE, LAKE SHORE AND WESTERN RY. CO.

(*Advance Case, Wisconsin. February* 7, 1882.)

Plaintiff, while going as a shoveller of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow bank from the track by means of the snow-plough alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business, which he assumed, and that the conductor and others, whose negligence is alleged, were fellow-servants in the same employment.—

APPEAL from Circuit Court, Milwaukee County.

Cottrill, Cary & Hanson, for appellant.

J. H. Opdale and Geo. B. Goodwin, for respondent.

ORTON, J.—A general demurrer to the complaint was overruled. The following appears to be a reasonable interpretation of the complaint, having reference to what is briefly expressed and clearly implied in its very imperfect statement of the facts: The defendant's train, with the conductor and others in charge of it, was at the time engaged in the business of clearing the railroad track from accumulations of snow upon it, and for that purpose the train was furnished with the usual appliances, including a snow-plough. The plaintiff, with several others, was employed to go upon and with the

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train to use shovels in assisting to remove snow from the track at a place or places near the village of Humboldt, where their services might be needed. It is not unreasonable to assume, from common experience and the usual conduct of such business, that the plaintiff and the other servants of the company employed to use the shovel were to perform such service in connection with the snow-plough and other appliances on the train, and were to use their shovels in removing any snow banks from the track which could not be readily removed by the snow-plough; and, if the snow-plough could readily run through the bank, those employed were to remain on board the train until they should come to a place where their services with the shovel should be required. It may also be assumed that it could not always be ascertained beforehand whether any particular bank of snow could be readily or safely removed by the plough without a trial and an attempt to do so. There is no allegation in the complaint that there was anything in the appearance of the particular bank of snow where this accident happened to indicate beforehand that it would be dangerous to attempt to remove it in this way, although there is an averment that the "train was with great force, and in a grossly careless and negligent manner, forced into said large bank of snow, thereby causing the car . . . to be violently thrown over," etc. When the first considerable bank was reached on this expedition the conductor, after commanding the plaintiff and the other shovellers to stay aboard of the train, caused the train to be drawn back quite a distance to get a good start and sufficient impetus, and then to be propelled into the bank with great force, in order to clear it from the track, but in doing so the car in which the plaintiff and the other shovellers were, and probably the forward end of the train also, were turned over, and the plaintiff greatly injured. From this complaint so construed, and we think this construction a reasonable one, the following inferences may be reasonably drawn, which constitute sufficient reasons in the law why the plaintiff is not entitled to recover: First, the plaintiff and the others employed to shovel snow, and the conductor and others in the charge and management of the train and snow-plough, were engaged in the same business of clearing off the snow which obstructed the railroad, and in such business they were co-employees and fellow-servants; second, the train, snow-plough, and shovels were the means and appliances to be used in this general business; third, the turning over the train in attempting to pass through a bank of snow with the snow-plough was one of the perils of the business, and a risk which all those engaged in the business and employment assumed; fourth, if there was any culpable negligence by any one engaged in the running of the train or snow-plough, it was the negligence of a fellow-servant with the plaintiff, for which he cannot recover.

The authorities sustaining these positions are so numerous that

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only a few need be cited. In a very recent case in this court, Naylor v. C. & N. W. Ry. Co., ante, 24, it was held that the railway company was not liable for the injury of the plaintiff from the falling down of an embankment upon him where he was shovelling gravel upon a gravel train, by the alleged negligence of the conductor of the train, on the ground that his injury was one of the hazards of his employment. The case of Sullivan v. India Manuf'g Co., 113 Mass. 396, is cited in that case, in which Devens, J., uses the following language, much in point: "Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions had been neglected." The following cases are also cited: Ladd v. R. R. Co., 119 Mass. 412; Clark v. R. R. Co., 2 Am. and Eng. R. R. Cases, 240. The following authorities are to the same effect: Frazer, L. M. and S. 210; Morgan v. V. of N. Ry. Co., L. R., 1 Q. B. 148; Lovell v. Howell, L. R., 1 C. P. D. 161; Moak's Underhill on Torts, 52; Steffin v. Ry. Co., 46 Wis. 259; Smith v. Ry. Co., 42 Wis. 526; Flanagan v. Ry. Co., 50 Wis. 462; S. C., 7 N. W. Rep. 337. In connection with the risks and hazards of the common business, the plaintiff being a fellow-servant and co-employee with the conductor, and others in charge of the train, prevents his recovery. Feltham v. England, L. R., 2 Q. B. 33; Tunney v. M. Ry. Co., L. R., 1 Q. B. 291; Seaver v. Boston and M. R. Co., 14 Gray, 466; Murphy v. Ry. Co., 53 Ill. 336; Chamberlin v. Ry. Co., 7 Wis. 425; Mosely v. Chamberlin, 18 Wis. 700; Cooper v. Ry. Co., 23 Wis. 668; Stetler v. Ry. Co., 46 Wis. 498; Brabbits v. Ry. Co., 38 Wis. 289.

The law in respect to the assumed hazards of the employment and the negligence of a fellow-servant is so well settled as to be almost elementary, and it is useless to cite other authorities than those found in the brief of the learned counsel of the appellant, which are so clearly in point. It is presumed that the learned counsel of the respondent would not contend that the plaintiff could recover upon this interpretation of the complaint, as upon the argument it was insisted that the train and the conductor were not engaged in the business of clearing the track from snow, and that no snow-plough was used, and that the conductor and the plaintiff were not engaged in the same business. But, as we think the facts above stated are clearly implied by what is expressly stated in the complaint, the law of the case against the plaintiff's recovery is unquestionable.

The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

See note, p. 535.

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GORMLEY, Adm'r,

v.

THE OHIO AND MISSISSIPPI RY. CO.

(72 *Indiana Reports*, 31. *November Term*, 1880.)

A servant of a railroad company employed in repairing the track thereof, and one employed in running trains thereon, are engaged in the same general undertaking; and where the former is injured by the negligence of the latter the company is not liable therefor.

A complaint for injuries sustained by the plaintiff through the fault or negligence of another is bad if it does not aver that the plaintiff was without fault or negligence contributing to the injury complained of.

FROM the Martin Circuit Court.

J. C. Denny, W. S. Granger, S. H. Buskirk and J. W. Nichol, for appellant.

C. A. Beecher and E. C. Devore, for appellee.

WOODS, J.—The appellant was the plaintiff below. The circuit court sustained a demurrer to the third paragraph of the original complaint, and also sustained a demurrer to the evidence adduced by the plaintiff.

It is not necessary to give a transcript or summary of the bill of exceptions. The point made upon the evidence may be considered and decided upon the following statement of the case, taken from the brief for appellant:

"STATEMENT OF THE CASE.

"The appellant is the administrator of the estate of Patrick Canfield, deceased. Canfield was killed on the 30th day of June, 1875, in Martin County, in a collision between a freight train and a hand-car belonging to and running on the track of the appellee. Canfield, it is admitted, and the persons in charge of the freight train were, at the time, in the employ of the O. and M. Ry. Co. Canfield being a laborer or section hand, whose duty it was to assist in repairing the track, etc., and, when he was killed, being on his way to work, riding towards the point of labor on the hand-car.

"The hand-car was running eastwardly and the freight train westwardly, and as the train suddenly rounded a curve in the road, which had obstructed it from view, it ran into the hand-car. The train was going at a rapid speed, being behind time, and the engineer was drunk and was sitting out on the pilot (cow-catcher) with a couple of companions, while the fireman, who was also under the influence of liquor, was in the cab. The testimony shows additional facts, which, beyond any doubt, establish neg-

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ligence on the part of the engineer; and no fault on the part of the deceased is shown."

Counsel for appellant insist that the deceased was not a fellow-servant, in the same line or department of employment, with the engineer and fireman whose drunkenness and negligence caused the injury, and the company should have been held liable. After citing and quoting from Gillenwater *v.* The Madison, etc., R. R. Co., 5 Ind. 339; Fitzpatrick *v.* The New Albany, etc., R. R. Co., 7 Ind. 436; The Ohio, etc., R. R. Co. *v.* Tindall, 13 Ind. 366; Wilson *v.* The Madison, etc., R. R. Co., 18 Ind. 226, and The Chicago, etc., Ry. Co. *v.* Harney, 28 Ind. 28, counsel say: "We are aware that the late decisions of this State repudiate the claim on which we rest the case at bar; but our object, in citing these earlier authorities is to recall the fact that there has been a conflict in the Indiana cases," etc.

The cases cited by counsel were not overlooked, but were referred to and explained or disapproved in the later cases. Slattery's Adm'r *v.* The T. and W. Ry. Co., 23 Ind. 81; The Columbus, etc., Ry. Co., *v.* Arnold, 31 Ind. 174; Wilson *v.* The Madison, etc., R. R. Co., 18 Ind. 226; The Pittsburg, etc., Ry. Co. *v.* Ruby, 38 Ind. 294; Sullivan *v.* The T., W. and W. Ry. Co., 58 Ind. 26.

These later cases are certainly not consistent with the ground on which it is sought to have a right of recovery in the appellant. If a hardship results from the application of the rule, that an employer is not liable to one employee for an injury caused by another employee engaged in the same general undertaking, it is more fitting that the Legislature be invoked to give a remedy, than that this court should undertake to introduce doubtful exceptions to a rule so clearly established.

That the appellant's case is within the rule as defined in these cases and the cases therein cited, as well as others which might be cited, there can be no doubt. We therefore hold that the court committed no error in sustaining the demurrer to the evidence.

The third paragraph of the complaint, to which a demurrer was sustained, was defective for this, if for no other reason, that it contained no averment that the deceased, Patrick Canfield, was himself free from fault and negligence which contributed to the injury complained of. Such an averment is necessary in every case, unless the facts and circumstances which are alleged are such as clearly to exclude any fair inference of such negligence, and that is not so in this case. The rule is too familiar to warrant the citation of cases, but see Sullivan *v.* The T., W. and W. Ry. Co., 58 Ind. 26.

Judgment affirmed, with costs.

See note, p. 525.

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GUMZ, Adm'r,

v.

C., M. AND ST. P. RY. CO.

(52 *Wisconsin Reports*, 672.)

A railroad company is liable for injuries suffered in this State by one of its agents or servants from negligence of any other agent or servant thereof, without contributory negligence on his part (section 1816, Rev. St.), and in case of his death from such injury the action may be brought by his personal representative.

Where there are two or more lines of action, any one of which may be taken, and such an agent, with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterwards ascertained by the result that his choice was not the best means of escape is not sufficient to charge him with negligence.

In this action for injuries from negligence the court did not err upon the evidence (stated in the opinion) in nonsuiting the plaintiff.

APPEAL from Circuit Court, Juneau County.

This is an action under the statute to recover damages for the alleged negligent killing of the intestate. About 11 o'clock in the forenoon of April 24, 1879, the section foreman of that portion of the defendant's road between Elroy and Camp Douglas, and six men, including the intestate, all in the employ of the defendant, having just completed some repairs just south or east of trestle No. 3, about three miles north of Elroy, proceeded upon their hand-car across that trestle, towards Camp Douglas, to make repairs further up the line. When about 300 feet north of the trestle they discovered a "wild" or "special" freight train, about 20 rods distant, coming towards them from the opposite direction around a curve and through a cut, so that at first they could only see the top of the smoke-stack. The section foreman immediately applied the brake, stopped the hand-car, and he and all his men got off, and he immediately commanded his men to shove or push the hand-car back, or, as some of the witnesses state in portions of their testimony, run the hand-car back, or, as the section foreman in due place states, "push the car back, and save her if you can; if you can't, save yourselves," and thereupon the intestate and his nephew, Charles Gumz, jumped upon the hand-car, while the section foreman and four of the men gave it a push down the track, when the foreman immediately ran upon the engineer's side of the track, some 60 to 90 feet towards the coming train, swinging his hat in his hand. It appears that the train was running, at the time it was discovered, from 10 to 12 miles an hour, and that when it was

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about 300 feet from the hand-car the fireman called the attention of the engineer of the train to the hand-car, and he immediately looked and saw the foreman coming with his hat in his hand, and so called for brakes and pulled the engine open, reversed it, and ran her on sand, and then saw the foreman about 90 feet ahead of the engine, and the hand-car about 90 feet beyond him, and the men pushing it. When the section foreman left the hand-car the intestate and his nephew, Charles Gumz, were on the hand-car pumping it back, while two of the men, Torrelson and O'Neill, were pushing the hand-car on one side, and two of the men, William Gumz and Munger, were pushing the hand-car upon the other side. Torrelson and O'Neill first left the hand-car and went off one side of the track. Munger and William Gumz continued on the side of the hand-car until they got about three rails, or 90 feet, from the trestle, when they let go and told the persons on the hand-car to jump off. The nephew of the intestate, young Charles Gumz, remained on the hand-car, with his back towards the train, pumping, until about the length of one or two rails from the trestle, when he jumped off, and at the same time told the intestate to jump off. The trestle was about 65 feet long. About the time the hand-car reached the trestle the intestate let go the handles, but kept his hands going up and down, and when from 3 to 10 feet on the trestle, and when the engine was still about 10 feet from the hand-car, he turned partly around and jumped or fell sideways into the trestle, between the rails of the track, and the hand-car passed over him, and also the engine, until the drivers were upon him; the front of the engine, when it stopped, being about the middle of the trestle, and the end of the hand-car on the front of the pilot.

The intestate was at the time 54 years of age, and left a wife and children. The fill or grade from the place where the hand-car was started back varied in height from two to ten feet. At the place where the hand-car started back the track was about two feet above the adjoining grade, and at the place where young Charles jumped off it was three or four feet down the bank to the bottom, and just before reaching the trestle-work the grade was six or seven feet down to the level. There was some evidence tending to show that when they first saw the train some of the men suggested to the section foreman that they had better put the hand-car off the track, which he declined to do. At the close of the testimony on the part of the plaintiff the defendant moved for a nonsuit, on the ground that the plaintiff had not established a cause of action by proof, and that the proofs showed that the intestate was guilty of contributory negligence, which motion the court refused to grant. At the close of the testimony the same motion was renewed by the defendant and granted by the court, and from the judgment entered thereon this appeal is brought.

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J. W. Lusk, for appellant.
J. C. Spooner and W. F. Vilas, for respondent.

CASSODAY, J.—By section 1816, Rev. St., every railroad corporation is made liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State. In case the injury causes death, such right of action is preserved by sections 4255–6, Rev. St., to the personal representative of such deceased person. There is no claim here of any negligence on the part of any one connected with the running of the train. There is no claim of any negligence by reason of the section foreman being on the track with his hand-car and men at the time and place in question, nor by reason of his failing to act or command promptly, and execute with vigor. The only negligence imputed to any agent or servant of the railroad company is the nature of the command given by the section foreman. It is claimed that it would have been safer to have put the hand-car off the track, or to have shoved it back without any one getting onto it, than to do as they did. It is also claimed that there was some evidence tending to show that the command was to "run" the hand-car back, which, it is claimed, meant to get onto it, and pump it back, and that from such command the jury had the right to infer negligence. We have great doubt whether the evidence would justify a special verdict that such command was in fact given; but for the purposes of this case we shall assume that it was.

The emergency presented for choice some one of at least four different lines of action. The command might have been to put the hand-car off the track. It might have been to let it remain on the track, and for the men to take care of themselves. It might have been to push it back as far as they could without endangering themselves, and without getting onto it. Or the command might have been for some to get on and pump, and the balance push as they did. Which of these several lines of action was most judicious? The danger was imminent. By calculation, it would seem that the speed of the coming train was such, if not slackened, as to bring it upon the hand-car in less than half a minute. Whether the speed would thus be slackened was a fact which the section foreman could not know, but at most could only conjecture. In any event, the attempt to slacken was certain to be postponed until the engine came out of the cut around the curve, and out from behind the embankment, sufficiently to enable the engineer to take in the situation and comprehend the danger. But he might not at that moment notice the hand-car. If he did not, a few seconds would bring the engine to a point where all attempt to materially slacken the speed would be futile. The peril was not only immediate, but great; not so much to the lives of the section fore-

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man and his men, for they at the moment were all on the ground, and we must assume that each had eyes, ears, mind, and the power of locomotion, with the natural instincts of self-preservation, and hence would be sure to escape, as it does not appear that there was, at the place where they were, any obstacles to prevent. There was, of course, danger to the hand-car, and counsel urge that that was the only danger in the mind of the section foreman at the time of giving the command; but we cannot shut our eyes to the fact that such danger was merely to property, and that, comparatively, of but trifling value.

It would seem preposterous to assume that the mind of the section foreman was wholly engrossed with the project of saving the hand-car, and that he did not comprehend the inevitable danger, if not obviated by him and his men, to the swiftly-coming train and the lives of the men upon it, having but very little opportunity of escape. These are some of the thoughts which naturally, and, as we think, necessarily crowded themselves upon the consideration of the section foreman at the moment when he was required to decide which of the lines of action indicated he would pursue. There was no time for deliberation. The emergency demanded an immediate decision. A few seconds of delay in giving the command, and the time for executing it would be past. There was no hesitation. The decision of the section foreman was immediate, his command prompt, and the commencement of its execution speedily followed, while he did what he could to arrest the attention of the engineer to the peril of the situation, and in that he seems to have been successful. The hand-car was started back towards the trestle, about 300 feet distant, with two men at the pump and two pushing at either side. The intestate was at the pump, with his face towards the coming engine, and, seemingly, in the best position of any of the section men to take in the danger of the situation, and the necessity rapidly being forced upon him to make his escape. There was, apparently, no difficulty in his seeing Torrelson and O'Neill leave the hand-car on the one side, and then Munger and his brother William leave the hand-car on the other, when the latter told him and his son to jump from the hand-car. So, a little later, he was, seemingly, in a situation to see his nephew jump from the hand-car, and at the same time hear his halloo for him to do the same, when there were still from 30 to 60 feet between the hand-car and the trestle. Thus, while the hand-car was passing over the 300 feet of track, upon a grade, no part of which was so elevated as to endanger life by jumping, the intestate, apparently, had not only warning, but time, for deliberation as to whether he would jump or remain, with the seeming capacity to do either. Just why he concluded to remain, can only be conjectured.

Certainly there was nothing in the command of the section fore-

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man which required him to remain upon the hand-car until it reached the trestle, even if he impliedly commanded him to get onto it. We do not say he was guilty of contributory negligence in deciding not to jump, for, in view of the constantly slackening speed of the train, it may be that he believed he was justified in taking his chances by remaining upon the hand-car; but we are to remember that the intestate was engaged in the service of the company, and hence had taken upon himself the usual and necessary risks of the service. Strahlendorf *v.* Rosenthal, 30 Wis. 674; Schultz *v.* Ry., 44 Wis. 638. In deliberately choosing as he did he took the risk implied in the choice. If contributory negligence is not to be imputed to the intestate for the decision which he thus finally made while passing over nearly 300 feet of track, then, for a much stronger reason, it would seem to follow that no negligence can be imputed to the section foreman for giving the command, under the circumstances in which he was placed. The court is asked, as a matter of law, to determine whether the jury were authorized to infer negligence from the command given, and in doing so it must necessarily determine whether any other line of action could have been chosen by the section foreman which would have been less hazardous. If there was not, then it would be unjust to hold him negligent in choosing the one instead of the other. In view of the weight of the hand-car (over 1000 pounds), the nearness of the train, the rapidity of its speed, and the intervening obstructions to the vision of the engineer, it would seem that the course taken was much less hazardous than an attempt would have been to put the hand-car off the track, the failure to do which is one of the grounds of the complaint. It may be that the section foreman had the option of a safer course than the one adopted; but even then, we should not impute negligence to such mere error of judgment. Such mere error of judgment does not have within it the elements of negligence. We conclude, therefore, that where there are two or more different lines of action, any one of which may be taken, and a person with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterwards ascertained by the result that his choice was not the best means of escape, cannot be imputed to him as negligence. See Schultz *v.* Ry., 44 Wis. 638.

The judgment of the Circuit Court is affirmed.

See note, p. 525.

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MANUEL
v.
C., R. I. AND P. R. CO.

(*Advance Case, Iowa. October* 20, 1881.)

Where, in an action by a servant against the master for injuries resulting from the negligence of co-servants, the petition stated that the injury occurred in a particular way, *held*, that a request to charge that to entitle plaintiff to recover they should be satisfied that the injury occurred in the manner stated in the petition, should have been given.

APPEAL from Appanoose Circuit Court.

The plaintiff was an employee of the defendant, working on a construction train, and alleged in his petition while so engaged his co-employees carelessly and negligently "let fall on the left foot of plaintiff a heavy iron rail," whereby he was greatly injured. In an amendment to the petition it is stated "that the two co-employees who let said iron rail fall carelessly and negligently on the foot of plaintiff were Swedes or some foreign nationality." There was a denial of the allegations aforesaid and trial by jury, verdict and judgment for plaintiff, and defendant appeals.

Vermillion & Vermillion, for appellant. No appearance for appellee.

SEEVERS, J.—The evidence tended to show the plaintiff and other employees of the defendant, at the time the accident occurred, were engaged in loading certain cars with old iron rails and bridge timbers. It became necessary to move some of the timbers after they had been loaded on a car; and the plaintiff testified while so engaged two of his co-employees raised, with crow-bars, an iron rail, which they carelessly let fall on his foot. The evidence on the part of the defendant tended to show the rail was not raised with crow-bars, and did not fall on defendant's foot because of the negligence of the defendant's employees.

The court stated the issues correctly to the jury, and, in substance, instructed them the plaintiff could recover if the injury was caused by the negligence of the defendant's employees, and the plaintiff had not been guilty of contributory negligence; but did not instruct the jury that before the plaintiff could recover he must have established, to their satisfaction, the injury had been caused in the manner alleged in the petition. The defendant asked the court to instruct the jury as follows: "Plaintiff does not claim in his petition that the timber or railroad iron was loaded on the defendant's car in a careless or negligent manner, and that he was injured thereby, but he does claim that two of defendant's em-

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ployees let a bar of said railroad iron fall on his foot in a careless and negligent manner, and that he was thereby injured. This is the only negligence claimed by plaintiff, and if you find from the evidence that the plaintiff has failed to establish, by the weight or preponderance of the evidence in the case, that he was injured by said iron rail being dropped on his foot, as alleged in his petition, he cannot recover in this case, and your verdict should be for the defendant."

This instruction was refused. We think it should have been given. The issue is correctly stated, and only required the jury should be satisfied the injury was caused in the manner it was stated to have occurred in the pleadings. That such is the clearly established rule there is no doubt. Under the instructions given the jury might well conclude it was sufficient if the injury occurred in any manner because of the negligence of the employees of the defendant. The instructions given were general. The one asked directed the attention of the jury to the specific matters upon which the plaintiff's right to recover was based in the pleadings. It therefore should have been given. Haines *v.* Ill. Cent. R. R. Co., 41 Iowa, 227. See, also, Muldowney *v.* Ill. Cent. R. R. Co., 32 Iowa, 176, and Owen *v.* Owen, 22 Iowa, 270. Reversed.

See note, p. 595.

The Union Trust Company, as Trustee, etc.,

v.

William C. Thomason.

(25 *Kansas Reports*, 1. *January Term*, 1881.)

The plaintiff was in the employment of the Union Trust Company, then operating and controlling the Missouri, Kansas and Texas Ry., as a trackman, whose principal duty consisted in repairing the track of the railway. To facilitate the work, the trackmen, or "section gang," were furnished by the company with a hand-car, operated by the men of the "gang," which enabled them to rapidly transport themselves and their tools from one portion of the track to another. A place was appointed at station S., in which, when not in use, the hand-car and tools were kept; and at the close of the day's labor on the track, it was the duty of the men to transport the hand-car and tools to this station, and there properly dispose of them until required the next day. On April 30, 1878, the plaintiff, at the close of his work on the track, was ordered by his foreman to put his tools on the hand-car, and to get on himself, which order he obeyed—the employees occupying three hand-cars, and the plaintiff riding upon the middle car. On the way to the station the rear car was propelled so fast by the men upon it that it, by the culpable negligence of the men operating it, was thrown against the middle car, which could not escape, in consequence of the nearness of the forward car, and

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thereby the middle car was thrown from the track, and the plaintiff seriously hurt. *Held*, the plaintiff was injured while in the line of his duty, and that he was within the provisions of the act of February 26, 1874, defining the liability of railroad companies in certain cases. (Comp. Laws 1879, p. 784, § 4914.) And further, *held*, that he was entitled to recover for all damages received by him in consequence of the culpable negligence or mismanagement of his co-employees.

ERROR from Davis District Court.

Action brought by Thomason against the Union Trust Company, as trustee of the Missouri, Kansas and Texas Ry. Co., to recover damages for personal injuries. Trial at the February Term, 1880, of the district court, and judgment for the plaintiff for $2000 damages and costs. The defendant brings the case to this court. The opinion states the facts.

David Kelso, for plaintiff in error.

McClure & Humphrey, for defendant in error.

HORTON, C. J.—This was an action to recover damages for injuries which the defendant in error, William C. Thomason, alleges that he suffered by reason of the negligence of the employees of the Union Trust Company, operating and controlling the Missouri, Kansas and Texas Ry. In substance, the case of the plaintiff below was this: His evidence conduced to show that he was in the employment of the Trust Company, as a trackman, whose principal duty consisted in repairing the track of the company's railway. He with several others formed a squad, which worked under the directions and orders of a foreman named Owen Buckley, called a "section boss." Their station or headquarters was at Skiddy, and they were appointed to keep in repair several miles of track leading from their station. To facilitate their work, and enable them to rapidly transport themselves and tools from one portion of the track to another, the company furnished them, as a part of their equipment, a hand-car, which was operated by the men upon the railway track. A place was appointed at Skiddy in which, when they were not in use, the tools and hand-car were safely kept. At the close of the day's labor on the track, it was the duty of the section-men to transport the hand-car and tools to the station, and there properly dispose of them until required for the next day's use. On the day Thomason was hurt, April 30, 1878, three sets of men were engaged upon the track. One was called the stone-mason gang, one the floating gang, and another the section gang. Thomason was one of the last. These gangs had been at work at different places on the track, extending south of the station of Skiddy as far as seven or eight miles. After labor had ceased upon the track, and about 6 o'clock P.M., they started for Skiddy with their tools upon three hand-cars, all going upon a single track. The hand-cars were propelled by a lever, worked by the men. The men of the section gang stopped work on the track and got upon a

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hand-car by order of Buckley, their foreman. Thomason, with eight or ten men, was riding on the middle hand-car. At a place about two miles south of Skiddy the three cars were together, and all the men loaded thereon. The rear car was propelled by the men upon it so fast that it was thrown against the middle car, which could not escape, in consequence of the near position of the forward car. The pressing and bumping of the rear car against the middle car threw the latter from the rails, throwing Thomason from it prostrate upon the track, in which position the car ran over him and inflicted very severe injuries. Before the middle car was thrown from the track, the foreman Buckley, riding on the rear car, was warned by some of the men that unless the speed of his car was checked there would be a collision and some of the men hurt, and he was requested to apply the brakes, which he refused to do. Soon after the collision and injury occurred. Upon the foregoing facts, Thomason claimed to recover under the act of February 26, 1874, defining the liability of railroad companies in certain cases. Section 1 reads as follows:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." (Comp. Laws 1879, p. 784, § 4914.)

The provisions of this act are substantially the same as those of the Iowa statute of 1862, and as the supreme court of that State had judicially construed the statute to apply to those engaged only in the hazardous business of operating railroads, before its adoption in this State, this construction follows it here. Under the instructions of the court, the jury found that Thomason was embraced within the provisions of the statute, and returned a verdict of $2000 damages.

Objections are taken by the company to the instructions—First, on the ground that the accident occurred after quitting-time, after the day's work was done, and so late that all the men would then have been at home had they started promptly after their work was over; and second, as the employment of Thomason was that of a laborer in repairing the railroad track, the statute of 1874, within the Iowa decisions, does not apply to the case.

The first objection is fully answered by the evidence. The foreman, Buckley, testified that the delay in returning to Skiddy was owing to the men being compelled to wait for the hand-car to be returned from going to the construction gang, where he had permitted it to be taken by some parties. He also testified that Thomason "was under his orders at the time of the accident." Thomason testified: "After they quit work on the track, his duty was to put the tools on the hand-car, transport them to the station [Skiddy], put them into the tool box and put the hand-car on the side

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track; that at the time he quit work on the track on the day of the accident, his foreman gave him orders to put the tools on a hand-car; that he said to the foreman there was no room on the front car, and was told to put the tools on and get on wherever he could." This, with the other evidence, clearly shows that his duties had not ceased at the time of the accident; that he rode on the hand-car, under orders, as an employee of the company, because he was an employee, where other servants and employees rode.

The second objection is likewise untenable. The statute does not embrace those only who are engaged in running cars or trains with engines fastened thereto, or those only injured by such trains. In Deppe *v.* C., R. I. and P. R. R. Co., 36 Iowa, 52, 55 (1872), the court rested the affirmance of a judgment of $7000 in favor of a laborer who had been crippled for life by the fall of a bank of clay while he was shovelling up loose dirt on a car, on the ground that where the employment is entire and a part of the continuous services relating to the perilous business of railroading, it brings the case within the statute and its constitutional limit. In Frandsen *v.* The C., R. I. and P. R. R. Co., 36 Iowa, 372 (1873), the party injured and complaining was a section hand, occupied with a line of employment similar to that of Thomason, on the road of this company. It was insisted before the court in that case that the section hand was not within the statute—that he was not engaged in operating a railroad, etc. The court, after citing the cases which counsel here cites in his brief, and which counsel before that court seems to have relied on, then remarks: "In view of all the facts and the entire argument, the plaintiff was, it seems to us, in the language of the first case above cited, 'engaged in the business of a railroad company;' or, in the language of the second, 'he was engaged in operating the road, and the like;' or, in the language of the last case, 'his service related to the perilous business of railroading.'"

Again, in Schroeder *v.* Chicago, etc., R. R. Co., 47 Iowa, 375, a person employed by a railway company at the work of taking down and removing a bridge, who was compelled by orders of his superior to go upon one of the company's trains, and while so doing was injured, was engaged in operating the road within the statute, and was entitled to damages.

In Lombard *v.* C., R. I. and P. R. R. Co., 47 Iowa, 494, the plaintiff was employed by the defendant in repairing its roadbed. At the time of the accident he was assisting in running a hand-car, and with other employees was returning to dinner. They occupied, as in this case, three hand-cars; the plaintiff was riding upon the foremost one. The accident occurred by the second car overtaking the first car, and running upon and against it, and throwing it partly from the track, whereby the plaintiff was thrown off and

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his leg broken. The court held that the employee was entitled to recover on account of the negligence of his co-employees.

In the late case of Pyne *v.* Chicago, etc., R. R. Co., 11 Cent. L. J. 55, a detective in the employ of a railroad company, and an engineer operating an engine on the road, are held to be fellow servants or co-employees. It was further held in the case, that the detective was within the statute, under the following circumstances: He was employed by the railway company to apprehend certain parties, and was directed to walk along the track of the road to a house by the roadside. As he was walking along on the track, in obedience to his instructions, he was, from sunstroke or some other cause, prostrated upon the track in an insensible condition, and while in that condition he was injured by the engineer of a passing train negligently running the train upon him. In the opinion the court says: "The statute does not embrace those only who are engaged in the operation of a railroad in running trains. Trackmen switchmen, and others, whose duty requires them to be upon the track, are more or less exposed to the hazards of the business of railroading, and such employees, when injured by the use or operation of the road, and by the negligence of co-employees, are as plainly within the provisions of the statute as those whose duty requires them to assist in the running of trains. The proper test in determining the question is, does the duty of the employee require him to perform service which exposes him to hazard peculiar to the business of using and operating a railroad? If it does, and if, while in the line of his duty, he, by the negligence of a co-employee, receives an injury from a passing train, or from other appliances used in the use and operation of the road, he may recover."

Some of these decisions are under the provisions of the Iowa statute of 1873, but as that act simply conforms to the statute of 1862, as construed and limited by judicial construction, they are authority in cases under like or similar statutes.

Upon an examination of all the instructions, we are clearly satisfied that the plaintiff in error was not prejudiced. Several of the instructions are erroneous, and unfavorable to the defendant in error. He has more reason to complain than the plaintiff in error; but as he seems satisfied with the final result of the action, we cannot interfere in his behalf.

The judgment of the district court will be affirmed.

All the justices concurring.

See Lombard *v.* Chicago, etc., R. R. Co., 47 Iowa, 494; Missouri, etc., R. R. Co. *v.* Haly, infra.

See note, p. 525.

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MISSOURI PACIFIC RY. CO.

v.

WOTEN HALEY, Adm'r.

(25 *Kansas Reports*, 35. *January Term*, 1881.)

The act of February 26, 1874, entitled "An act to define the liability of railroad companies in certain cases," is not in conflict with any of the provisions of the constitution of the State.

This act was adopted by the Legislature of Kansas from the statute of Iowa, and the judicial construction given to the statute in that State follows it to this State; therefore, within the Iowa decisions, it embraces only those persons engaged in the hazardous business of railroading. The care or diligence the statute exacts toward the employee, is that degree of diligence which men in general exercise in respect to their own concerns, and contributory negligence of the injured employee bars a recovery under the statute, as in other cases.

A person employed upon a construction train to carry water for the men working with the train and to gather up tools and put them in the caboose or tool car, is within the statute making railroad companies liable to their employees for injuries resulting from the negligence of co-employees.

Where such an employee upon a construction train, consisting of an engine, two cabooses and four or five flat cars, with the engine coupled on to the caboose, with the flat cars in the rear, all slowly backing at the rate of about four miles an hour, is directed by the conductor in charge of the train to pick up a crowbar lying crosswise near the rear end of the rear flat car, and while in the act of stooping to pick up the bar, falls off and is killed by being run over by the cars, and the fall is caused by a sudden concussion or jerk of the cars from reversing the engine by the engineer to stop the train, on account of cattle near to the track at the rear of the train, and neither the statute, the rules of the company, nor the custom on the trains, requires any preliminary signal or warning to the laborers upon the train to enable them to hold fast, or otherwise secure themselves to the cars, before reversing the engine or stopping the cars under such circumstances, *held*, that upon these facts the engineer was not guilty of culpable negligence in failing to ring the bell or sound the whistle, or giving other signal before reversing the engine; and further *held*, that the accident, if not directly contributed to by the want of care of the employee falling from the car, may be denominated entirely a fortuitous one, for which the railroad company is not liable.

Negligence is not to be presumed, but must be proven; and where the evidence in an action for damages against a railroad company, under the statute of February 26, 1874, shows that all the co-employees exercised toward the injured employee that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances, no liability is established against the company.

ERROR from Wyandotte District Court.

Action brought by Woten Haley, as administrator of the estate of William Deal, to recover damages sustained by two minor children of the deceased. Trial at the July Term, 1879, of the

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district court, when the plaintiff asked the court to instruct the jury as follows:

"1st. That the law of this State provides that 'every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage."

(Given, and excepted to.)

"2d. If you find from the preponderance or weight of the evidence that the death of William Deal was caused in consequence of any negligence or mismanagement of the engineer of the defendant, the plaintiff is entitled, as a matter of law, to a verdict at your hands."

(Given and excepted to.)

"3d. If the jury find that the plaintiff should recover, they have the right to assess the damages at any sum not exceeding $10,000, which in their judgment may be deemed just and proper under the evidence."

(Given and excepted to.)

The defendant asked for the following special instructions:

"1st. The jury are instructed that, to entitle the plaintiff to recover on the ground of negligence or mismanagement of any co-employee of the deceased, they must find from the evidence that there was negligence or mismanagement in fact, and it devolves upon the plaintiff to show affirmatively, and by a preponderance of evidence, wherein such negligence or mismanagement existed; and they are not to assume that it did exist from the mere fact that William Deal was killed by defendant's train."

(Given.)

"2d. The court instructs the jury that if they find for the plaintiff, they should, under the evidence in this cause, assess only nominal damages."

(Refused, and excepted to.)

"3d. The court instructs the jury that, in considering the amount of damages, if they find for the plaintiff, they should not allow anything on account of the physical or mental sufferings of the deceased, or for the sorrows, suffering or grief of his personal representatives."

(Given.)

"4th. The court instructs the jury that if they believe, from the evidence, that the deceased, by his own carelessness and negligence, directly contributed, in whole or in part, to bring upon himself the injuries from which he suffered, then the plaintiff cannot recover."

(Refused, and excepted to.)

"5th. Although the jury may believe that the plaintiff's intestate

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was injured while an employee of the defendant so that he died from such injuries, and that they were occasioned by the negligence of a co-employee of the defendant, or were caused by any mismanagement of an engineer of the defendant, yet the plaintiff cannot recover in this action."

(Refused, and excepted to.)

"6th. The court instructs the jury that under the pleadings and evidence in this case, the plaintiff cannot recover, and you will find for the defendant."

(Refused, and excepted to.)

The court charged the jury as follows:

"The law-makers in organizing courts have divided the same into two branches—the judge and the jury. Upon the judge devolves the duty of giving you the law applicable to the testimony in each case; and upon you devolves the duty of deciding the facts of the case. You are not only the sole and exclusive judges of the facts of the case, but you are the sole and exclusive judges of the credibility of the testimony; that is to say, you are the only judges as to the weight that shall be attached to the testimony of each and every witness. That is a duty, as I said, that devolves solely upon you, and over which the court has no control.

"This action is brought by the plaintiff, Haley, administrator of William Deal, deceased, to recover damages for the death of William Deal, that resulted—as plaintiff claims—from the negligence of the engineer of the defendant.

"I have stated to you, gentlemen of the jury, the parties to this suit. I have done so in order to refresh your memory as to the cause, not as to the parties. The inquiries, 'Who is the plaintiff?' and 'Who is the defendant?' are inquiries that never should be made either by a court or a jury. By this I mean that the court and the jury should be absolutely blind to the parties to the litigation. You are to inquire only into the cause, not as to the contestants. You are not only, gentlemen of the jury, to be blind to the parties to the suit, but you are to be free in the decision of all cases, both you and the court; you are to be entirely free, and divested from any friendship, hatred, anger or pity in the decision of any and all questions of fact; and when a court or a jury departs from this duty and is controlled in the least by any of these passions of the mind, we not only shall, as a matter of fact, but we ought to cease to command the respect of the public, and they will rise in their majesty and institute other tribunals that will command respect. We are all liable to come into courts of justice to have our rights vindicated, and we have a right to have those rights determined by impartial tribunals; and as I said before, when we cease to have those rights ascertained and determined in that manner, without bias or prejudice, without passion

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of any kind, courts and juries will cease to command respect, and the administration of justice be a farce.

"I make these remarks, gentlemen of the jury, because it has been in this case as in nearly all cases, the litigants are usually discussed more thoroughly than the litigation, and I do it in order to divert and call your attention rather to your duties as well as to mine. Perhaps it is unnecessary to make these remarks, but in view of the comments that have been made by counsel on both sides I think it my duty to do so.

"Then, gentlemen, the sole question for you to determine is, as to whether this deceased person came to his death by the negligence of the defendant, or of its servant, the engineer. That is the principal question for you to determine; and that, as I before said, depends upon the facts as established by the testimony in the trial of this cause, and is a question for you alone to determine. The law in this case will be given to you in writing, and will consist of the special instructions asked by the plaintiff, as well as the defendant, which I will now read you."

The jury found a general verdict for the plaintiff, and assessed his damages at $10,000. A new trial was denied, and judgment rendered for the plaintiff. The defendant brings the case here. Other facts appear in the opinion.

Thos. J. Portis, E. A. Andrews, and E. J. Sherlock, for plaintiff in error:

HORTON, C. J.—This was an action brought by Woten Haley, as administrator, against the Missouri Pacific Ry. Co., to recover damages sustained by two minor children of William Deal, deceased. Deal received fatal injuries near Connor's station, between Wyandotte and Leavenworth, on January 8, 1878, caused by the alleged negligence of one Patrick Kelley, then an engineer and employee of the railway company. It appears from the evidence given on the trial, that at the time the deceased was injured he was also an employee of the company, engaged in working with the laborers on the construction train, upon which E. F. Seymour was the conductor, Patrick Kelly the engineer, Mark Nettleton the brakeman, and Nelson Thompson, fireman. He had been working on that train with this conductor about two years, and had been in the employ of the company on construction trains over four years. His duties were, to carry water for the men, gather up tools and put them in the caboose or tool car until he got time to put them into the tool chest. There were about twenty-five laborers with the train. On January 8, 1878, the men on the train—consisting of an engine, two cabooses, one called in railroad parlance a "dinky," used as a tool car, and four or five flat cars—were engaged in gathering up old rails along the track from Kansas City toward Leavenworth, the engine in front, the cabooses in the rear. Connor's

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station was as far as they were going, and there being a pile of iron between the main track and the switch track, just beyond, but near this station, the conductor directed the engineer to pull in upon the switch track, take his engine around the train on the main track and come into the switch at the east or south end, couple on to the cabooses, pull out toward the east, and back up the main track to where the pile of iron lay. The engineer in obeying the orders given was backing up the main track to where the pile of old iron lay, at the rate of about four miles an hour. The ends of the flat cars were west, the locomotive was east; the cabooses were between the engineer and the flats, the engine being coupled on to the caboose nearest it. There was a crowbar used by the laborers lying crosswise on what was now the rear end of the rear flat car, which conductor Seymour directed the deceased to bring forward about the time the train commenced to back. The deceased fell off the rear end of the last flat, was run over, and so severely injured that he died within an hour. Up to the time the conductor ordered the deceased to pick up the bar at the end of the rear flat car, the testimony does not disagree. As to the circumstances occurring just prior and just subsequent to the fall of deceased from the car, there is a wide conflict.

In substance, the case of the plaintiff is this:

"That the deceased, while in the performance of his duty as a laborer on the construction train, and in obedience to the orders of the conductor, and while the train was in motion and backing down, went to the rear end of the rear flat car of the train to get a crowbar, and while in the act of stooping to pick up the bar, the engineer, without notice or warning to the deceased, suddenly reversed the movement of the locomotive and train, whereby the deceased was thrown from the train and killed; that his death was caused by the neglect and carelessness of the defendant, in not giving the usual signal or customary warning."

The strongest testimony supporting the claim of the plaintiff was that of James Cyphers, who was present at the time the deceased was killed. He testified as follows:

"Question: State to the jury when and where you last saw William Deal. Answer: While alive, or dead?

"Q. Living. A. When I saw him last living, he was on the rear flat car of the Missouri Pacific construction, at Connor's station, Kansas.

"Q. State what, if anything, you know about his death; state fully the particulars. A. When I last saw William Deal, I was then myself in the caboose—that is, the tool car, a caboose called both caboose and tool car, used for the men, and also for carrying tools in to work on the road with, shovels, picks, etc., and all kinds of implements for working on the road. The last I saw of William Deal was while I was standing in this tool car. I last saw him on

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the rear end of the flat, three or four paces from the end of the flat. I last saw him in the act, just when he fell off, or rather, just before the concussion came. I saw William Deal in a half-stooping posture—in that position [indicating position], as if to pick up something. I saw him rise up, throw his hands that way [indicating]; the concussion came, and he stumbled and fell off the car, with his head toward the river. The end of the flat was west; the locomotive was east. There were two cabooses, one called a 'dinky,' in railroad parlance (what they call a caboose and tool car), and these cabooses were between the engine and flat; and I saw him in that position. I saw him tumble over.

"Q. You refer to some concussion. What do you mean? A. I mean the sudden stopping of the car.

"Q. Which way was the car running when you saw Mr. Deal stooping down, apparently to pick up something? A. West.

"Q. Backward or forward? A. Backward, backing up.

"Q. What was the next motion of it? A. The next motion was a sudden stop, a very sudden stop, a very short stop.

"Q. How many of you were in the caboose at that time? A. I could not tell you the number of men at that time.

"Q. Was there a number of men? A. There was a number of men; yes, sir.

"Q. What was the effect? You speak of a sudden concussion: how did that concussion occur? A. The effect was they were thrown on top of each other—thrown up to the other side, some of them. I was thrown up against the door of the car.

"Q. State what that was caused by. A. It was caused by the sudden stopping of the train.

"Q. Did it stop and stand still? A. It stopped perfectly still for an instant.

"Q. And was that the cause of throwing the men about the caboose? A. Yes, sir.

"Q. At what rate of speed was the train running when it was running back, before this reversing of the engine? A. I think about as fast as a man ordinarily can trot.

"Q. How near was Deal standing to the edge of the flat car? A. Three or four paces.

"Q. State if you know what took him there. A. Well, sir, he was sent there by the conductor of the train, for the purpose of getting a crowbar they used for the purpose of unloading iron.

"Q. You say he went back to get a bar? A. He went back to get a bar.

"Q. Was there any alarm or notice given to the men of the reversing of the engine? A. No, there was not.

"Q. Were you in a position where you could have heard any whistle or ringing of the bell? A. I was.

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"Q. Was there any signal given in any other way? A. There was not."

The evidence in behalf of the company conduced to show that the deceased had obeyed the orders in regard to picking up the bar, and had brought it forward; then had returned to the rear end of the car, and was sitting down on the end with his legs hanging over; that he fell off; that the conductor discovered him under the car trucks and ordered the engineer to stop; that the engine was not reversed until after his fall.

The jury returned with their general verdict the following findings of fact:

"Question 1. Do you find that Patrick Kelly, the engineer was negligent in the management of his engine at the time William Deal was injured? Yes.

"Q. 2. Do you find that Patrick Kelly, the engineer, mismanaged his engine at the time William Deal was injured? Yes.

"Q. 3. Do you find that Patrick Kelly was a competent and fit engineer to manage the engine at the time William Deal was injured? Yes.

"Q. 4. Do you find that the defendant knew, or by the exercise of ordinary care could have known, that Patrick Kelly, at the time William Deal was injured, was unfit and incompetent to run the engine on that train? If he was incompetent they might have known it, but we believe him competent.

"Q. 5. Do you find that either Mr. Walshe, the assistant master mechanic, or Mr. Phelps, the foreman of the round-house, knew that Patrick Kelly, at the time William Deal was injured, was incompetent or unfit to run the engine on that train? No; they could have no personal knowledge of the fact of his competency or incompetency, not being present at the time of the injury of William Deal.

"Q. 6. Do you find that either Mr. Walshe, the assistant master mechanic, or Mr. Phelps, the foreman of the round-house by the exercise of ordinary care, might have known that Patrick Kelly, at the time William Deal was injured, was incompetent or unfit to run the engine on that train? They might have known his competency by using due care and diligence.

"Q. 7. Do you find that Patrick Kelly reversed his engine at the time William Deal was injured before he was ordered to stop by the conductor or fireman? Yes.

"Q. 8. Do you find that William Deal was a careful ad prudent man? Yes.

"Q. 9. Do you find that William Deal was a careless and reckless man? No.

"Q. 10. Do you find that at the time William Deal was injured there was a slight jar or a heavy concussion? A heavy concussion.

"Q. 11. Do you find that at the time William Deal was injred he

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was in the act of throwing a rock or lump of dirt at cattle upon or near the track? No.

"Q. 12. Was the death of Deal caused by any neglect of the employees of the defendant? Yes.

"Q. 13. Was Deal guilty of any negligence proximately contributing to his death? No."

The jury assessed the damages at $10,000, and judgment was entered accordingly. Several exceptions were taken to the rulings of the district court; and the principal questions arising upon the assignments of error will be considered by us—not, however, in the order presented.

As the plaintiff bases his right to recover under the provisions of the act defining the liability of railroad companies in certain cases, approved February 26, 1874, the defendant's counsel challenge the constitutionality of the statute in a long and able argument.

The statute reads as follows: "Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." (Comp. Laws 1879, ch. 84, § 29.)

This statute was adopted from the laws of Iowa, enacted in 1862 by the Legislature of that State. All the objections, except one, now urged to the alleged viciousness of its provisions, have been successfully met and answered in the opinions of the supreme court of that State. (McAunich *v.* Mississippi, etc., R. R. Co., 20 Iowa, 338; Ney *v.* The Dubuque, etc., R. R. Co., 20 Iowa, 347; Hoben *v.* The B. and Mo. R. R. Co., 20 Iowa, 562; Hunt *v.* The C. and N. W. R. R. Co., 26 Iowa, 363. See also K. C., Ft. S. and G. R. R. Co. *v.* McHenry, 24 Kas. 501; Ditberner *v.* Chicago, M. and St. P. R. R. Co., 47 Wis. 138.) We concur in the views expressed by the Iowa court as to the constitutionality of the statute, and hold it a valid exercise of legislative power. As our State has adopted the statute from Iowa, the judicial construction given to it in that State follows it to this State. (Bemis *v.* Becker, 1 Kas. 226.) Therefore the act embraces only those persons more or less exposed to the hazards of the business of railroading. "If there is an employer and employee, but no business of a railroad company to be engaged in, then the case is not within the act." (McAunich *v.* Mississippi, supra; 2 Thompson on Neg., p. 1000; Union Trust Co. *v.* Thomason, 25 Kan. 1.)

The additional or new objection to the validity of the statute now presented is, that the act is in conflict with § 1, art. 14 of the constitution of the United States. We have examined the argument and authorities upon this point, but do not think the section referred to has any application.

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Upon the trial, the defendant requested the court to instruct the jury "that if they believed from the evidence that the deceased, by his own carelessness and negligence, directly contributed, in whole or in part, to bring upon himself the injuries from which he suffered, the plaintiff cannot recover." The instruction was refused, and herein the court erred, for the charge of the court ignored entirely the question of the contributory carelessness of the deceased, and the want of proper care and watchfulness on his part to avoid the injury. The court must have construed the act of 1874 as having wiped out contributory negligence as a defence—as being intended to hold railroad companies to extraordinary diligence and care on the part of the co-employees; that is, to make them liable for slight neglect; or else it assumed that there was no evidence tending to show negligence on the part of the deceased. The decisions already quoted clearly establish the doctrine that the care or diligence which the statute exacts toward the employee is that degree of diligence which men in general exercise in respect to their own concerns. This is denominated in legal language, ordinary diligence. Contributory negligence of the injured employee bars a recovery under this statute, as in other cases.

Further, it was hardly fair to assume that there was no proof of contributory negligence on the part of the deceased. Mark Nettleton, a brakeman on the train, called as a witness by the plaintiff, testified:

"There was some stock on the track near the road, at Connor's switch, near the west end of the switch—that is, they were near the track; there were none on the track at the time we started the train, I think. We were backing up. I was on the platform of the caboose, at the brake, next to the flat car.

"Q. Go on and state what occurred. A. Mr. Deal went out there on the flats; I didn't know what purpose he went out for at the time. When he started he went by me—passed by me, but I didn't speak to him; I thought I would ask him what he was going for, but I didn't; I let him go on; didn't say anything to him.

"Q. You saw Deal go to the rear end of the train? A. Yes, sir, to the last flat—that is, the rear flat; saw him pick up an iron bar there; I saw him—I wouldn't be positive whether he laid the bar down again or not, but he stooped down again, picked up a clod or rock, I don't know which, to throw at this stock—the cattle along the track; they were a little way from him, on the side of the track; and about the time he threw the rock or clod at the cattle my eyes were taken off him, just at the moment; the next time I looked that way he was off the car, on the ground; I saw him down at the side of the car.

"Q. State what, if any, shock occurred to the train. A. There was a slight shock; I felt it on the caboose; I supposed I knew what occasioned the shock at that time.

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"Q. What occasioned it? A. I supposed it was done by the engine being reversed—the lever thrown over. I left the brake when I felt the jar on the caboose, and stepped to the side of the caboose to give the signal to go ahead and that there was no stock on the track. I could see the track all clear from where I was; there was nothing in the way at all."

This witness also testified on direct examination:

"Q. What was Deal's character as to prudence and as to being a careful man? A. I don't think he was as careful a man as some others would be on the train.

"Q. You will state whether you regarded him as a reckless man or not. A. He did some things on the train that I regarded sometimes as being reckless. I used to talk with him sometimes about it myself."

Floyd Davis, a young man about nineteen years old, living near Connor's station, who happened to be near at the time of the accident, testified: "Saw deceased just before he was killed, sitting down, with his legs hanging over the end of the car." On cross-examination, he said: "I saw the man fall as soon as the train was reversed."

Another witness, one Julius Kern, said, speaking of deceased:

"I thought he sat down. I could not say positively whether he did or not. He was too low almost to be standing up where I saw him.

"Q. You thought he was sitting down with his feet over the end of that car? A. Yes, sir."

The instruction ought therefore to have been given, because if there was mutual negligence—that is, reciprocal or contributory negligence of like degree—the plaintiff was not entitled to recovery and, assuming that the evidence tended to prove culpable negligence on the part of the defendant, there was sufficient evidence to go to the jury of contributory negligence on the part of the deceased. The omission of this instruction was the more harmful because there was no explanation to the jury of the words "any negligence or any mismanagement." The jury may have understood the instruction, "If you find from the preponderance or weight of the evidence that the death of William Deal was caused in consequence of any negligence or mismanagement of the engineer of the defendant, the plaintiff is entitled, as a matter of law, to a verdict at your hands," to mean that slight negligence only, or the mere failure to exercise extraordinary diligence, was sufficient to demand a verdict for plaintiff. Such is not a true interpretation of the law. In all cases under the statute the jury should be informed that the defendant is liable only for want of ordinary care.

In view, however, of the special findings of the jury, and as more extended and elaborate instructions upon the question of

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negligence were not submitted to the court by defendant, the defects pointed out might not be deemed fatal to the judgment, if the general verdict and special findings of fact had any support in the evidence. This brings us to the consideration of the paramount question in the case, whether the company was guilty of negligence, culpable negligence, at all. Was any evidence given at the trial tending to prove that the death of the deceased was caused by the negligence or want of ordinary care of the defendant? What constitutes negligence in a particular case is generally a question for the jury, and not for the court, is undoubtedly true; but the facts being conceded, or undisputed, the question of negligence becomes a question of law. Especially is this true where but one deduction can be drawn from them. Negligence is not to be found without evidence. There is always a presumption against it; and therefore a plaintiff who asserts it, and avers that his intestate has received injuries resulting in his death in consequence of it, must always adduce proof that the defendant did not exercise ordinary care; at least, taking the whole record, some evidence of want of ordinary care must appear in a case of this character to sustain a recovery. In the charge of the court, the jury were instructed that the sole question to be determined was, whether the deceased came to his death by the negligence of the defendant, or its servant, the engineer. The charge in the petition is, "that while the deceased was in the act of stooping down to pick up the crowbar, the engineer of the train carelessly, negligently and recklessly, and without notice or warning to the deceased, suddenly reversed the movement of the locomotive and train, whereby the deceased was then and there, without any negligence or fault on his part, thrown from the train and under the cars, and was so crushed and injured that he on the same day died; that the death of the deceased was so caused by the neglect and carelessness of the company in not giving the usual and customary signal or warning." In another part of the petition, the allegation is, "that it became the duty of the defendant to give notice by signal or warning of the starting, stopping or reversing the movement of the train; and that the defendant wholly failed to give such notice or warning at the time the train was stopped and the engine reversed." The special findings show, we think, that the sole negligence or mismanagement alleged was the act of the engineer in reversing the engine and stopping the train without ringing the bell or blowing the whistle, or giving other notice or warning. If the engineer was not negligent, culpably negligent, no one of the other co-employees was negligent, and no cause of action was proved. The inquiry is, then, was the engineer negligent? All negligence, to be culpable, necessarily implies the failure to properly perform some duty. Now what duty did the engineer owe to the deceased, or to the other laborers on the train, which he did not properly perform?

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What duty did he owe in the conduct of the engine or in the management of the train which he failed to properly fulfil? None whatever. It is conceded that there is no statute requiring the ringing of a bell or the blowing of a whistle on the reversing of the engine or stopping of a train, under such circumstances as those under which the engine was reversed and the train stopped by the engineer.

Some attempt is made by counsel of plaintiff to show that there is a custom of blowing the whistle as a signal to the men upon a train that the engineer is about to stop the train, or reverse his engine, or shut off steam, so that they may secure themselves from being thrown off by a sudden concussion or jerk of the cars. The evidence is clearly to the contrary. The only witness who was examined about the custom or duty of the engineer in this regard was George Walshe. He was the assistant master mechanic for defendant, and was called as a witness for the defence. On cross-examination he said, in answer to questions, as follows:

"Q. Is it customary when cattle are reported to be on or near the track, and it is desired to avoid any collision with them, to ring a bell or sound a danger whistle? A. As soon as he finds cattle near the track, the first thing that an engineer does, as a general thing, is to open the cylinder cock, in order to frighten them off, if he sees them at the outset.

"Q. What effect has the opening of the cylinder cock? A. To blow a hissing sound to attract their attention, till they see the cars and pass off the track.

"Q. Has that action of the engineer anything to do with the whistle, with what we call the danger signal? A. Sometimes the first thing that an engineer will do, if he finds there is great danger, in order to save killing cattle, is to reverse his engine, and then, if he wants the assistance of the brakemen, he will raise his hand and pull the cord and blow the whistle.

"Q. Does the quick, sharp whistling indicate anything from the engineer to the brakemen, or is it just to whistle the cattle off the track? A. One sound of the whistle will be to apply the brakes, two to loosen them up, and a number of sounds will be a case of danger.

"Q. When a number of sounds is given on a passenger train or any other train, it indicates danger? A. Yes, sir.

"Q. Is there any action called for by this danger signal, by the brakemen; are they to answer the signal by checking up? A. They apply the brakes.

"Q. Upon a danger signal being given? A. If he has time to give that signal; the impulse is first to reverse the engine, and then to raise his hand and blow the whistle.

"Q. Is it not the universal, undeviating practice on all well-regulated railroads that when there is danger, and it is possible for the

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danger whistle to be blown, to blow it? A. It will depend greatly on the speed he is going; if a man is going very slow, he can stop before he can sound his whistle, because the quickest movement would be to reverse the engine.

"A. It is not, then, customary, if I understand you? A. After he has done that part, then he will apply the whistle.

"Q. The question was not what he would do; I am asking you what the practice is on well-regulated railroads? A. That is the practice.

"Q. What is the immediate effect of the reversal of the engine, as you call it? A. The first thing it does is to throw steam into the opposite ends of the cylinder and stop the piston, and that stops the cranks, and that stops the driving wheels, and that stops the engine, and that stops the tender, and then next the cars that are attached to them.

"Q. Is that all? A. So on back.

"Q. Then the result of a reversal is simply to stop the train, is it? A. Yes, sir.

"Q. It does not propel it the other way? A. No, not at the time.

"Q. What other action is necessary? A. It reverses the application of the steam in the cylinders.

"Q. Does it require any other action on the part of the engineer to start? A. After that is started, he applies the steam; he opens the throttle-valve, and it gives steam into the cylinders, and so passes back."

This evidence proves, if it proves anything, that when cattle are reported on or near the track, the customary thing to be done by the engineer, if he sees the cattle at the outset, is to open the cylinder cock to frighten them away by blowing a hissing sound; that sometimes, when the engineer finds there is great danger, in order to save killing cattle, he reverses his engine, and, if he wants the assistance of the brakemen, he raises his hand, pulls the rope and blows the whistle. If the train is going very slow, the engineer can stop before he can sound the whistle, as the quickest movement is to reverse the engine. In this case, as the train was going at the rate of only about four miles an hour, the practice would have been, as was actually adopted by the engineer, to reverse the engine before blowing the whistle or giving other signal. The engineer, therefore, followed the usual practice; so that it cannot be said that he was under any duty or obligation by any rules or any established custom in the discharge of his services, or in the management of the engine or train, to give any signal or warning to the men on the train to make themselves secure on the cars, or to hold fast with their hands to their seats or other fastenings, as he was about to reverse the engine and stop the train.

Plaintiff's counsel make a final argument in support of the judg-

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ment, that even if it is customary to reverse an engine and stop a train, as this one was stopped, without notice or signal to the train-men, such a practice or custom ought not to be sustained as a valid custom, on grounds of public policy, and cite Berg v. C., M. and St. P. Ry. Co., 2 Am. and Eng. R. R. Cas. 70. In that case "it appears from the evidence given on the trial that, at the time plaintiff was injured he was at work for the defendant as a trackman, and had been in such employment for about two years. On the morning of December 21, 1878, he was engaged with others, under the direction of the proper foreman, in removing snow and ice from a track in the depot yard of the defendant in the city of Milwaukee. A locomotive, pushing a box car, passed him going south. He looked in the direction from whence it came, and seeing nothing else approaching, commenced work on the same track, with his back to the south. Two other men facing south were also at work on the same track, a few feet south of him. Very soon after the plaintiff commenced work a car was thrown upon the track on which he was at work, south of him, detached from the locomotive. It was probably the same car which passed him shortly before. There was a brakeman on the top of it. The car moved slowly, and just as it approached the two men at their work they saw it and got off the track. It passed on, struck the plaintiff, knocked him down, pushed him along the track a short distance, and then one wheel passed over his leg, injuring it so that it was necessarily amputated above the knee. When the plaintiff was struck he cried out, and the brakeman, who was about to descend, or was descending from the car, ran to the brake at the other end of the car, turned it down and stopped the car before the second wheel of the forward truck passed over the plaintiff."

The jury found specially, that there was a brakeman upon the car just preceding and at the time of the accident; that this brakeman did not call to the men working on the track to look out; and that the brakeman was guilty of a want of ordinary care and diligence at the time of the accident. The court in its opinion says:

"We understand, from an examination of the testimony, and from the argument of the learned counsel of the defendant, that the custom sought to be proved is that, in switching cars in the depot yard, it is not the duty of the railway company to have a brakeman or other person upon each train of cars in motion, or upon each car which is being moved separately, to give warning to the men at work in the yard of approaching danger, but that a car may be sent along any of the tracks attached to or disconnected from a locomotive, as the exigencies of the business may require, without any one upon it; and in such case the men employed in the yard must look out for themselves. That is to say, it is not per se negligence of the company or its employees thus to move a car in its yard, unattended, and the peril of injury from a car so

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moving is, by the custom, one of the perils of the service, the risk of which is upon the servant. This custom was fully proved on the trial. But the custom has little significance in this case, for the reason that there was a brakeman on the car, who saw the plaintiff at work on the track upon which the car was moving a sufficient time before the injury to have stopped the car before it reached the plaintiff, or to have warned him of its approach. The custom does not relieve the defendant of liability for the negligence of its other employees. It did not relieve the brakeman of the duty of stopping the car, or of warning the plaintiff of its approach, or cast upon the plaintiff the risk of his failure to do so. No such custom was referred to in the question proposed, and none was proved. On the contrary, the evidence tends to show that the brakeman should have given the trackman some notice or warning of the approach of the car. On the grounds of public policy, a custom which would permit the brakeman to let the car run upon the trackmen when he knew their peril, and could easily avoid it, can hardly be sustained as a valid custom."

Therefore, the decision of the court is based upon the negligence of the brakeman, who saw the plaintiff at work on the track upon which the car was moving a sufficient time before the injury to have stopped the car before it reached the plaintiff, or to have warned him of its approach. This is sound doctrine, and meets fully our approval. The reference to the custom of not having a brakeman upon such train of cars in motion to give warning to the men at work is a dictum; but assuming it to be the law, still the authority cited does not cover the case here presented. The engineer did not know that the deceased was on or near the rear end of the flat car when he reversed his engine; the cabooses intervened between him and the flats, and he was unable to see the flats at all. He was not responsible for the make-up of the train, and was backing at a slow rate of speed, in accordance with orders, and used the usual means to stop the cars. He was not bound to anticipate some accident not likely to occur, or to so conduct his management of the engine as to prevent an accident not likely to happen. No such danger was manifest, or could be reasonably anticipated, as was liable to occur in throwing cars upon a track where laborers were busily engaged at work, without any brakeman or other person to give warning to such employees; which action the Supreme Court of Wisconsin held in the case of Berg *v.* C., M. and St. P. Ry. Co., supra, not sustainable as a valid custom. There are some risks and perils incident to the peculiar hazards of railroading which every employee necessarily takes upon himself when he enters upon any service connected with the operation of a railroad, which even the extraordinary diligence of his co-employees may not always avert. The employee is presumed to have full knowledge of these usual and ordinary dangers to his

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employment, and greater care and caution are required of him to prevent accidents than of persons not so employed; and the engineer had the right to presume that all the other employees would act with proper care and caution in the discharge of their employment. Our own statute makes the company or employer liable for the injuries arising from the carelessness and negligence of those who are in the same employment—that is, the co-employees; but the statute requires only ordinary care and diligence, and if the employee suffers from the perils of his service which ordinary diligence cannot protect him against, the company is not responsible. The accident of January 8th, 1878, upon the strongest testimony of plaintiff, if not caused by the negligence of the deceased, was entirely a fortuitous one, not resulting from the culpable negligence of the engineer or other co-employees; and therefore we are of the opinion that there was no evidence to go to the jury of negligence on the part of the defendant. All the facts, and the only fair deduction to be drawn from them, clearly show that the engineer exercised that degree of care and diligence which an ordinarily prudent person in a like position would have exercised. The court below should have sustained the demurrer of the defendant to the plaintiff's evidence; and there was no testimony admitted thereafter to cure this error.

This case has been a long time under advisement. We have given it careful attention, and while feeling that great difficulty is thrown upon the judges who are called upon to determine questions of this sort, we find no clear pathway of duty in the matter but by deciding, as a matter of law, that negligence was not proved. The findings of the jury, that the engineer was guilty of negligence, may have resulted from an imperfect understanding of the degree of care and diligence required of him in the management of the train and engine, owing to the meagre instructions given; they may have supposed that the phrases, "any negligence," "any mismanagement," include negligence and mismanagement of all degrees and character; or they may have assumed, in the absence of more specific directions, that the failure to ring the bell or sound the whistle, before reversing the engine, was negligence per se to the deceased.

The judgment of the district court will be reversed, and the cause remanded.

VALENTINE, J., concurring.

BREWER, J.—I concur in the judgment of reversal. After a careful examination of the testimony, I am impressed with the conviction that under the circumstances of this case, negligence cannot fairly be imputed to the defendant. At the same time, I do not wish, even by implication, to be understood as assenting to the doctrine that the custom or rules of the company, or the lack

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of any special statute, are conclusive on the question of negligence. It may often be the duty of courts to pronounce conduct negligent, and grossly so, although sanctioned by the custom of the road and the rules of the company, and forbidden by no statute.

See Hohen v. Burlington, etc., R. R. Co., 20 Iowa, 562; McKnight v. Iowa, etc., Co., 43 Iowa, 406; Frandsen v. Chicago, etc., R. R. Co., 36 Iowa, 372; Shroeder v. Chicago, etc., R. R. Co., 47 Iowa, 375; Potter v. Chicago, etc., R. R. Co., 46 Iowa, 399; Hunt v. Chicago, etc., R. R. Co., 26 Iowa, 363; Lombard v. Chicago, etc., R. R. Co., 47 Iowa, 494; Lang v. Holiday, etc., R. R. Co., 42 Iowa, 677; Carlin v. Chicago, etc., R. R. Co., 37 Iowa, 316; Steel v. Iowa, etc., R. R. Co., 43 Iowa, 109; Hamilton v. Des Moines, etc., R. R. Co., 36 Iowa, 31. See note, p. 525.

RAINS

v.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO., Appellant.

(71 *Missouri Reports*, 164. *October Term*, 1879.)

It is settled law in this State that although the defendant may have been guilty of negligence contributing to produce the injury complained of, still if plaintiff was also guilty of negligence proximately contributing thereto, defendant is not liable unless his negligent act occurred after he became aware of the danger to which the plaintiff, by his own neglect, had exposed himself. Hence, where the defendant's neglect consisted in the erection and maintenance of a dangerous structure obvious to the senses long before the accident,—*Held*, that he was not liable, whether the structure could have been differently built or not. (Following Nelson v. A. and P. R. R., 68 Mo. 593, and other cases.)

To constitute a servant of a railroad company the vice-principal, so as to hold the company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard. (Following Gowan v. St. Louis and Iron Mountain R. R., 61 Mo. 528; Marshall v. Schricker, 63 Mo. 308.)

If a brakeman knows that a foot bridge over the railroad upon which he is employed is too low to permit a man standing erect on the top of a freight car to pass under it in safety, and, nevertheless, remains in the service of the company, and while passing under the bridge on the top of a freight car stands erect and is killed by coming in contact with the bridge, the company is not liable.

What circumstances will mitigate or aggravate a wrong done, is a question of law. Hence, in cases arising under the 3d section of the damage act (R. S. 1879, § 2123), if any such circumstances exist they should be pointed out by proper instructions, and the jury should be restricted to a consideration of those so designated.

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The "necessary injury" resulting to a parent from the negligent killing of his minor child within the meaning of the 3d section of the damage act (R. S. 1879, § 2123), consists in the loss of services of the deceased during minority, the cost of nursing, surgical and medical attendance and appropriate funeral expenses.

APPEAL from Bollinger Circuit Court.

The eleventh instruction given for plaintiff authorized the jury to treat the acts and negligence of one William Madge toward deceased as the acts and negligence of defendant, and to hold the defendant liable accordingly, provided they should find that said Madge, at the time of the accident which occasioned this suit, "was acting for and in the employ of defendant in the yard at Belmont, and that his duties were to direct and control assistant brakemen in said yard in the employ of the defendant, and that the deceased was, at and prior to his death, one of such."

Wm. R. Donaldson, for appellant.

B. B. Cahoon, for respondent.

HOUGH, J.—This was a suit under the third section of the Damage Act, to recover damages for the death of the plaintiff's minor son, who was killed at the town of Belmont, on a side track of the defendant's road, by coming in contact with a foot bridge extending across said side track from the upper story of an elevator on the east side thereof to the upper story of a freight house on the west side thereof.

This bridge was not high enough to permit persons of ordinary height to pass safely under it, while standing erect on the top of the box cars of a freight train. For about one month before the deceased was killed, he had passed under the bridge in question at least three times daily, while rendering service as brakeman on the freight trains of defendant. At the time he was killed, he was on the top of a freight train, with his back to the bridge and the engine, running or walking rapidly toward the rear end of the train, while it was passing under the bridge, and as he did not move as rapidly in the direction he was going as the train was moving in the opposite direction, he was borne backward against the bridge, which struck him on the head and killed him. There was testimony tending to show that the deceased was not in his proper position on the train, and that he was warned of the danger he was in immediately before he came in contact with the bridge. The deceased was twenty years and six months old when killed. The jury rendered a verdict for the plaintiff for $2000, and the defendant has appealed.

Among other instructions given for the plaintiff was the following: "Although William Rains may have failed to exercise ordinary care and prudence at the time he was killed, and may have been guilty of negligence or carelessness which contributed to the injury complained of, yet, if the defendant might, by differently

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erecting or maintaining the bridge spoken of by the witnesses, or by the exercise of ordinary care and caution, have avoided the injury, the jury will find for the plaintiff." This instruction is not the law. The cases cited by the plaintiff, in which instructions similarly worded received the qualified approval of this court, were wholly unlike the present. They were not cases in which the acts of the defendant occasioning the injury consisted in the erection of insufficient or dangerous structures, obvious to the senses long before the accident, and therefore long before the concurring negligence of the plaintiff, but they were cases in which negligent acts of the defendant, contributing to produce the injury, occurred after the contributory negligence of the plaintiff, and without which the plaintiff would not have been injured, notwithstanding his own want of reasonable and ordinary care. And, in a case of the latter class, an instruction like the one under consideration was condemned. Maher *v.* A. and P. R. R., 64 Mo. 276. It is the settled law of this State that, although the defendant may have been guilty of negligence contributing to produce the injury complained of, still, if the plaintiff was also guilty of negligence proximately contributing thereto, he cannot recover, unless the negligent acts of the defendant occasioning the injury occurred after he became aware of the danger to which the plaintiff, by his own negligence, had exposed himself. Karle *v.* K. C., St. J. and C. B. R. R., 55 Mo. 484; Isabel *v.* Han. and St. Jo. R. R., 60 Mo. 482; Maher *v.* A. and P. R. R., 64 Mo. 276; Nelson *v.* A. and P. R. R., 68 Mo. 593. The instruction under consideration, which, in effect, told the jury that the plaintiff was entitled to recover, if the defendant could have so constructed the bridge as to have prevented the injury complained of, even though the deceased failed to exercise ordinary care and prudence at the time he was killed, and was thereby guilty of negligence contributing to his death, is in direct conflict with the foregoing authorities, and, indeed, with all the authorities everywhere on this subject. We cannot say that an instruction so fundamentally wrong was not calculated to mislead the jury in a case like the present, no matter how correctly the law may have been declared in other instructions. Instructions B and C, given by the court of its own motion, contain the same error, and are, therefore, in conflict with the views here expressed.

We do not think the facts stated in instruction numbered 11, given for the plaintiff, constituted Madge a vice-principal of the defendant, and that instruction was, therefore, wrong. We have heretofore announced the law on this subject in McGowan *v.* St. L. and I. Mt. R. R., 61 Mo. 528, and Marshall *v.* Schricker, 63 Mo. 308.

Instructions numbered 6 and 11 asked by the defendant should have been given. They are as follows: 6. "If the deceased knew of the exposure to danger in serving as brakeman for the defendant

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upon a train having to pass a foot-bridge insufficiently high to permit him to pass under it while standing at full height on the top of a box-car, and with such knowledge consented to and did continue in the service of defendant as such brakeman, and was thereafter killed by coming in contact with said foot-bridge, then the plaintiff cannot recover from the defendant for any negligence in the construction of the said foot-bridge."

11. "If the deceased, while in the discharge of his duty as brakeman, passed under the foot-bridge in question frequently for the space of two or three weeks, and knew the danger of coming in contact with the top of said foot-bridge, and his attention had been called to the danger of injury from the lowness of the foot-bridge, and with this knowledge he stood or walked erect on the top of the box-car, and while so standing or walking erect there was, in passing, struck by the foot-bridge and killed, then the jury are instructed that this was contributory negligence on the part of the deceased and that plaintiff cannot recover." These instructions are precisely like two instructions which received the approval of this court in Devitt *v.* P. R. R., 50 Mo. 302, the facts in which case very closely resemble the controlling facts in the case at bar.

As this case is to be remanded for another trial it may be proper to make some observations as to the measure of damages. In cases arising under the third section of the damage act, the jury should not be left to grope their way unaided through the testimony to find the circumstances of mitigation, or aggravation, which the statute authorizes them to take into consideration in making up their verdict. What circumstances will mitigate or aggravate a wrong done, is a question of law, and if any such circumstances exist, they should be pointed out by the court, and the jury should be restricted to a consideration only of those so designated.

In actions by a parent for the death of a minor child, we are of opinion that in estimating the damages, the jury may properly consider, in addition to the circumstances of mitigation or aggravation before mentioned, the loss of services of the deceased during his minority, the cost of nursing, surgical and medical attendance, and appropriate funeral expenses. These constitute "the necessary injury resulting from such death," to which the plaintiff is restricted by the statute. Porter *v.* H. and St. Jo. R. R., 2 Am. and Eng. R. R. Cas. 44. The judgment will be reversed and the cause remanded.

All concur.

See Wells *v.* Burlington, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 243; Clark *v.* St. Paul, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 240.

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FERGUSON

v.

CENTRAL IOWA RY. CO.

(*Advance Case, Iowa. April* 22, 1882.)

Where the plaintiff, an employee of a railroad company, was injured while uncoupling the cars of the company through an alleged negligence of the engineer, and there was some doubt whether plaintiff's employment required him to perform this service, the jury may decide that it was in the line of his employment.

If a particular manner of uncoupling cars while in motion was a customary way of doing the work, and was negligent and wrong, the plaintiff himself for the time being in command of the movements of the train, he is himself in part responsible for the injury, and should not be heard to complain,

Where instructions asked were properly refused, and those given by the court seem to fairly embody the law applicable to the case, judgment in favor of the plaintiff, against the instructions and rulings of the court, will be reversed.

APPEAL from Marshall Circuit Court.

Action for damages for a personal injury. There was a trial by jury; verdict and judgment for the plaintiff. The defendant appeals. The facts necessary to an understanding of the questions determined will be found in the opinion.

H. E. J. Boardman and A. C. Daly, for appellant.

Sutton & Childs, for appellee.

ROTHROCK, J.—1. The plaintiff was in the employment of the defendant as head brakeman on a freight train. While the train was on a side track at Marshalltown, at the instance of the yard master, and in the absence of the conductor, the plaintiff went between the engine and the car next to it, while the train was backing, and attempted to uncouple the car from the engine by pulling the pin. He failed to do so, and, the train being in motion, his foot was caught by a wheel of the tender, and crushed so as to require amputation. It is charged in the petition that it was the duty of the engineer in charge of the engine to obey the signals given by the plaintiff, and that said engineer, while plaintiff was attempting to uncouple the car and engine, suddenly, and without warning to plaintiff, greatly increased the speed of the engine, and pushed it against plaintiff with great force, and pushed him down between the engine and car, and plaintiff's foot was caught by the brake-beam on the tender of the engine, which was placed too low down, so that he could not extricate himself, and that "when plaintiff could not get loose from the brake-beam he called to the engineer, John Armor, to stop, but he paid no heed to him, but ran the said

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engine faster than before. . . ." There was the usual answer in denial, and alleging that the plaintiff by his own negligence contributed to the injury. The plaintiff, in his testimony, stated that the brake-beam on the tender was placed too low down, and that because it was too low down his foot was caught, and although he threw his body outward he could not extricate his foot, and he was thus injured. He also admitted that he knew before he attempted to make the coupling that the brake-beam was hung too low. This allegation of the petition is all wrong, and the plaintiff was, to say the least, mistaken in stating that the brake-beam was too low down. The evidence shows beyond all controversy that it was properly placed, and in perfect order. The jury found specially that it was "in a good, safe condition."

There was no evidence in support of the allegation of the petition that the plaintiff called to the engineer to stop, and that after the call the engineer ran the engine faster than before. No outcry was made until after the injury. There is some controversy in the case as to whether or not the plaintiff was required by his employment to uncouple the cars. The defendant contends that it was the duty of the yard master, and those under his charge, to do the work in the yards, and that plaintiff was a mere volunteer in attempting to uncouple the cars. It appears that the uncoupling was for the purpose of setting out the cars next to the engine, and leaving them behind. The conductor was not upon the ground, and the yard master signified what cars were to be left, and under his direction the plaintiff proceeded to do the work. It is a matter of some doubt whether the plaintiff was by his employment required to perform this service. But we think the jury were warranted in finding that he was in the line of his employment, and was not for that reason precluded from recovering for his injuries. It would be unjust to draw nice distinctions in a question like this as to when the plaintiff was required to take upon himself the duties pertaining to his employment.

2. It is conceded that the plaintiff attempted to uncouple the cars from the engine while the train was in motion. In his examination in chief the plaintiff states that they were "probably moving four miles an hour." In his cross-examination he qualified his estimate of the speed by saying that it was from two to four miles an hour. He further stated that the train was at a stand, and that the yard master gave the signal to him, and that he, plaintiff, gave the signal to the engineer to back up, and that it was his, plaintiff's, duty to give the signal.

A material question in the case is whether or not the plaintiff, in the exercise of proper care and to free himself from contributory negligence, should have stepped forward a short distance and uncoupled the cars before giving the signal. He states in his testimony that he "might have done that," and that the train moved

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on his signal. He was asked this question: "You could have reversed your signal and stepped a few feet forward and went in and uncoupled?" Answer. "Well, I might have got in the frogs there or they might have started up." There is no claim or pretence anywhere in the case that the engineer would have backed up without a signal to do so from the plaintiff, and how the plaintiff could have been injured by getting in the frogs when the train was not in motion it is difficult to understand. We have given these facts in the case touching the acts of the plaintiff as bearing upon the question of his negligence, in view of an interrogatory which was submitted to the jury by the court at the plaintiff's instance, and which is as follows: "Did the plaintiff perform his duties in connection with the cars in question in one of the usual ways adopted by defendant's employees and permitted by the defendant?" Answer. "Yes." The defendant objected, and excepted to this interrogatory being submitted to the jury, and assigns the same as error. The evidence shows that the manner in which the uncoupling is ordinarily performed is (1) by standing outside the rail and reaching over and pulling the pin; (2) by standing on the brake-beam attached to the tender; and (3) by standing between the rails or with one foot between them. We are not prepared to say that under the evidence the plaintiff was negligent in stepping between the rails as he must have done and as he admits he did.

Thus far, we think, the question was not objectionable. But whether or not the plaintiff was justified in going between the car and the engine while they were in motion, because this line of conduct was permitted by the defendant, is, under the facts of this case, quite another question. There is no evidence that any such permission was given in the way of any rule or regulation of the company. It is true that in making up trains, and in coupling cars thereto, and it may in some cases in uncoupling, be necessary to go upon the track when cars are in motion. It must be done when coupling cars, in order to give direction to the coupling link. But this is not always the case. The most that can be said as to permission of the company in this case is that brakemen were in the habit of uncoupling when the train was in motion, and that such habit was generally known to the other employees of the company. But it is not pretended that the plaintiff would have violated any rule, regulation, or requirement of his employment if he had uncoupled the car before giving the signal to back up, or waited until his signal to slow the train had been obeyed. Indeed, it appears to us that, under the circumstances of this case, the permission of the defendant to uncouple cars while in motion at the rate of from two to four miles an hour was an improper matter to submit to the consideration of the jury, because the plaintiff himself was for the time being in command of the movements of the train. It was required to move or stop on his signal, and there

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was no restraint upon him, and no cause for him incurring danger either from any rule or regulation of the defendant, or by reason of any permission from it. If it was a customary way of doing the work, and was negligent and wrong, the plaintiff himself was in part responsible for it and should not be heard to complain. Kroy *v.* C., R. I. and P. R. Co., 32 Iowa, 357. We think the court erred in submitting the question.

It is said, however, that the submission of this interrogatory to the jury was without prejudice, because it is in no manner inconsistent with the general verdict, and nothing is claimed for the interrogatory and answer thereto. But this is not the test as to whether the error was prejudicial. The jury must have been led by the question to believe that because there was no evidence of a rule or regulation as to how cars should be uncoupled, and nothing showing a dissent upon the part of the defendant from uncoupling at any rate of speed, that the plaintiff was not negligent. That was the natural tendency of the question if answered in the affirmative, as it was. The question would have been more appropriate if it had directed the jury to the simple inquiry whether or not the plaintiff was guilty of negligence in going between the cars when in motion, and stepping over the rail to pull the pin, taking into account the fact that the train was under his own control.

3. There are other errors assigned and argued. So far as they involve the matter of instructions to the jury it appears to us that the instructions asked to be given by the defendant were properly refused, and we have examined those given by the court on its own motion with some care, and they seem to fairly embody the law applicable to the case. Those relating to the rulings on evidence and to the misconduct of the jury need not be considered.

For the error above discussed the judgment will be reversed.

LANCE

v.

CHICAGO, MILWAUKEE, AND ST. PAUL R. R. CO.

(*Advance Case, Iowa. March* 21, 1882.)

Where, in proceedings for the condemnation of lands, the award of compensation is made jointly, to the owner, and a mortgage of the land taken, it will be presumed to have been made on proper notice to both parties, and the owner may appeal from the assessment of damages without the mortgagee being a party to such appeal.

Where, in condemnation proceedings, it appeared that at the time the railroad entered upon the right of way there were crops growing thereon, which were destroyed by the construction of the road, *held*, that it was competent

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to show their value as an element of damages. The measure of compensation for the right of way in such cases is the difference in value of the land immediately before and the value after the right of way is taken, excluding the benefits of the road to the farm.

In proceedings for the condemnation of land for a railroad, a right of way was taken along the edge of a grove of trees, which stood between the house and other buildings and the railroad, and, upon the trial of an appeal from the award, witnesses were allowed to testify that, owing to the proximity of the track, there was danger of the fire from the engines running through the dry leaves, and destroying the grove and buildings, and also to testify as to the value of the grove and dwelling-house. *Held*, that the admission of such evidence was error.

APPEAL from Osceola Circuit Court.

This is a proceeding to condemn a right of way for the defendant's railroad across certain improved land owned by the plaintiff. It appears from the assessment of the commissioners appointed by the sheriff that one Ozias was the owner of a mortgage upon the farm, and the damage occasioned by the taking of the right of way was assessed to the plaintiff and Ozias jointly. From this assessment the plaintiff appealed to the circuit court, by serving a notice of appeal upon the railroad company within the proper time. Afterwards the defendant filed notice to dismiss the appeal because Ozias did not join therein. Thereupon the plaintiff served notice on Ozias to the effect that he had appealed from the assessment made by the commissioners appointed by the sheriff, and stating that the appeal would be for trial at the next term of the circuit court. The motion to dismiss the appeal was thereupon overruled. There was a trial by jury, which resulted in an award of damages greater in amount than that allowed by the commissioners appointed by the sheriff. From this award the railroad company appealed.

George E. Clark and M. B. Carey, for appellant.

I. I. Bell and Argo & Kelley, for appellee.

ROTHROCK, J.—1. The first point presented in the record involved the question whether the motion to dismiss the appeal because Ozias, the mortgagee, did not join therein, should have been sustained. Whether it is necessary to make a mortgagee a party to proceedings to condemn land for a right of way, we need not determine. In this case it appears that the assessment was made to the owner of the land and to the mortgagee jointly. We will presume it was done on proper notice to both these parties. We have, then, the question whether the owner in such case must be denied the right to maintain an appeal because the mortgagee neglected or refused to join therein.

In C., R. I. and P. R. R. Co. *v.* Hunt, 30 Iowa, 73, it was held that, where damages are assessed jointly to two persons as owners of the land, an appeal cannot be taken and prosecuted by one of them without uniting the other therein, or making him a party thereto by notice or otherwise. The reasoning in that case has no

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application to the case at bar, simply because the rights of a joint owner and those of a mortgagee are wholly different. Where an award has been made in favor of the owner and mortgagee jointly, the mortgagee may be entirely content with the award, or his security may be such that it is a matter of indifference to him whether any award whatever is made. The land may be ample security for his debt, with the encumbrance of the right of way upon it. In such case it would be a great hardship to deny the owner of the land the right to prosecute an appeal because the mortgagee declines to incur the expense of joining therein; and further, the defendant cannot be prejudiced by the failure of the mortgagee to join in appeal. His rights with reference to the right of way were adjudicated by the commissioners appointed by the sheriff, and he is thereby estopped by such adjudication from enforcing his mortgage against the right of way.

2. At the time the railroad company entered upon the right of way there were crops growing thereon, which were destroyed by the building of the road. The court permitted the plaintiff to prove the value of the growing crops as an element of damages. Objection was made to this, and the ruling of the court thereon is assigned as error. The ruling was unquestionably correct. The condition of the land, at the time the defendant entered upon it, was proper to be shown. The measure of compensation for the right of way is the difference in the value of the land immediately before and the value after the right of way is taken, excluding the benefits of the road to the farm.

3. The right of way was taken along the edge of a grove of trees which stand between the house and other buildings and the railroad. A number of witnesses were permitted to testify that owing to the proximity of the grove to the track there was danger of fire from the engines, running through the dry leaves, and destroying the grove and buildings upon the farm; and testimony was admitted as to the value of the grove and the dwelling-house. All of this evidence should have been excluded for two reasons: (1) The evidence as to continual danger from fires set out by the engines used in operating the road was incompetent, because mere matter of opinion upon a question not involving science or skill. It was competent to show the situation of the grove and buildings, and the jury were as well qualified as the witnesses to determine the probable effect upon the property by the operation of said road. (2) The testimony as to the value of the grove and dwelling-house was given in the same connection as that pertaining to the danger from the escape of fire. The jury could have understood the evidence admitted in no other way than that it was allowable to take into consideration the value of the grove and house, upon the theory that they would probably be destroyed by fire.

In this view, and, indeed, in any view, we think all this evidence

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was improperly admitted. The compensation allowed for right of way should be direct and proximate, and not remote and contingent upon circumstances which may or may not transpire. In Henry v. D. and P. R. R., 2 Iowa, 288, the rule was laid down that when, by the taking of a right of way, the remaining land is thrown open and left, in a manner, unfenced, this fact will properly enter into consideration in arriving at the depreciated value of the remaining premises; but that the allowance of damages by estimating the fences necessary to be built to again enclose the land was not permissible. The rule in that case has been repeatedly followed by the court. Now, applying that rule to the evidence admitted in this case, it is plain that no estimate can be made in the way of compensation for the value of the property which may be destroyed by fire and without the fault of the railroad company.

The most that can be claimed is that it is competent to take into consideration the risk of fire set out by the defendant without its fault, and by reason of the operation of the road through the premises. But this risk or hazard or exposure of the property is an entirely different question from that involved in its destruction by fire without the fault of the company. In the one case, while the risk may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth, in fixing the compensation to the owner, in the other case the destruction of buildings, groves, or the like, by fire, is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law. Of course, it will be understood that we are treating of such risks and hazard from fire as result from the operation of the road in such a manner that if fire should escape there would be no liability as against the railroad company. For its negligence it would be liable to the owner, and this element should not be taken into account in estimating the compensation.

The foregoing discussion disposes of all the material questions involved in the case. For the error in admitting the objectionable evidence the judgment will be reversed. See note, p. 852.

ALLEN

v.

BURLINGTON, CEDAR RAPIDS, AND NORTHERN RY. CO.

(*Advance Case, Iowa. March* 21, 1882.)

In an action by a brakeman for injuries sustained while getting off the train in the discharge of his duties, the injury resulting from his coming in contact with a cattle chute that projected to within from 19 to 23 inches from the passing car, witnesses were allowed to testify that it was in the line of

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duty for a brakeman to get off the car when it was in motion, and also how and when he should get off, when called upon to turn a switch. *Held*, that the admission of such evidence was erroneous.

Evidence was admitted, on behalf of the plaintiff in such action, to the effect that a man could not, with safety, ride by this chute holding to the side of the car, as plaintiff had been doing. *Held*, that evidence offered by defendant to show that persons had frequently ridden upon cars as broad as the one on which the injury occurred, between the chute and the outside of the car, when the chute was the same as at the time of the accident, should have been received.

Certain instruction, taken in connection with others that were given, *held*, not of a character liable to mislead the jury upon the question of negligence upon the part of the plaintiff.

A railroad company has no legal right to construct cattle chutes in such close proximity to its track as to endanger the safety of employees operating its trains, although by so doing it may be better enabled to load and unload live stock.

Refusal to give an instruction proper in itself, when the doctrine expressed therein is fairly stated in another instruction that was given, *held*, not error.

APPEAL from Des Moines District Court.

Action to recover damages sustained from personal injuries received by plaintiff while employed as a brakeman upon defendant's railroad, which were caused by negligence of defendant. There was a verdict and judgment for plaintiff. Defendant appeals.

J. & S. K. Tracy, for appellant.

Newman & Blake and Dodge & Dodge, for appellee.

BECK, J.—1. The plaintiff in the discharge of his duty as a brakeman was required in the night-time to couple to his train certain cars upon a side track, to be taken or removed by his train. A "cattle chuté" was situated near this side track, which was passed by the cars under the charge of plaintiff, upon one of which, a coal car, he was at the time, having previously made the coupling. While getting down from the car in order to change a switch, the train being in motion, he was struck by the "cattle chute" and thrown to the ground. A wheel of one of the cars ran over his foot, crushing it so that amputation became necessary. The "cattle chute" was shown to be from 19 to 23 inches from the passing car. The issues in the case involve the negligence of the defendant in constructing the "cattle chute" too near the side track, and the want of care of the plaintiff in getting down from the car in such manner that he was struck by the "cattle chute." Upon these issues the following testimony on the part of plaintiff was introduced, against defendant's objection:

M. Portland, a witness for plaintiff, testified, in response to the following questions: (1) "Tell the jury the usual way that brakemen get on and off these coal cars in proper railroading, in the line of their duty." Answer. "There is but one safe way to get on the car; that is, to get up by placing the foot on the truck or jour-

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nal box, and get off the same way. . . ." (2) "Now, from your experience as a brakeman, will you please tell the jury, if this chute stood 15 to 19 inches from the outside edge of the car, whether that was a reasonably safe distance for a brakeman to operate and endeavor to get off a car in the night-time in the dark?" Answer. "It is not a safe distance from the track, because it will not permit a man passing between the car and chute."

Turner, a witness for plaintiff, was permitted, against defendant's objection, to testify as follows: (1) "Tell the jury how a brakeman, in the line of his duty, would prepare to get off a coal car to turn a switch in the night time." Answer. "Get over the side of the cars and stand on the box-stand on the journal." (2) "Is it within the line of duty of a brakeman who is switching in this way to wait until the train has run down past the switch, and then get off and turn the switch?" Answer. "No, sir; it is not his duty to do that—to wait until the train stops." (3) "I will ask you whether it is in the line of duty of a brakeman to get off of a coal car at a switch for the purpose of turning it while it is in motion." Answer. "Yes, sir; it is the duty of a brakeman to work as quick as he can; and to do this he must get on and off the train while it is in motion." (4) "Is there any danger to a brakeman, in the line of his duty, in getting off the side of a coal car or getting ready to get off the side of a coal car in the night-time to turn a switch, on account of a solid body being 15 or 19 inches distant from the outer edge of the car?" Answer. "There is. It is impossible, I should think, for a man's body to pass through a space of that kind, and, for that reason, there would be danger—all possible danger."

Parker, another witness for plaintiff, was permitted to testify as follows: (1) Question. "In going up to the cars, state whether it is within the line of duty of a brakeman to get off the car when it is in motion." Answer. "Yes, sir. He should get off the car; be ready to get off at the switch. In preparing to get off it would be his duty to get over the side of the car." (2) "Where should he place himself?" Answer. "In a car of this kind he would have to stand on the journal box, get over the side, and put his foot on the box and his hands on the side; this would be within the line of his duty." (3) "How soon should a brakeman prepare to get off his train—jump off a moving train and turn a switch—to be within the line of his duty?" Answer. "In time to get off at the switch, he would be in the line of his duty if he prepared to go off at once, when the train is operated with steam brakes, and when he only goes 95 steps."

Other evidence to the same effect was admitted against defendant's objection.

2. This testimony, in our judgment, is an expression of the opinion of the witness, which will plainly appear upon brief con-

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sideration. The witness declared that certain acts were within the "line of the duty" of the brakeman. While it was competent for the witnesses to state, as a fact, what services were performed by the brakeman in the discharge of his duty, they ought not to have been permitted to express an opinion that a particular manner of performing such services was required of him in the discharge of his duty. The duty of a brakeman may be prescribed by rules of the company employing him, or by custom prevailing in the operation of railroads. It pertains to the particular services performed and the purposes to be accomplished. It may require him to couple and uncouple cars, to change switches, to check the speed of the train, etc. It requires him to do these things in a reasonable, careful, and prudent manner, with a view to his own safety, as well as the safety of the train. He is required to use the appliances intended for the different work done by him. The discharge of his duties may be performed in different ways. The manner of his performance of duty must be distinguished from the duty itself. Now, a brakeman in the discharge of his duty, is required to descend from a car in order to change a switch. The descent may be made in a prudent or in a careless manner. But the brakeman would not be excused for carelessness on the ground that his duty required him to descend, if the act could have been done in another manner with greater safety.

The expression in the evidence just quoted, "in the line of duty," was doubtless used in its correct meaning as synonymous with the words "in the discharge of duty." The court in the instructions used the expression in this sense. The jury understood the witnesses when they declared an act of the brakeman to be "in the line of duty," to express the opinion that the duty of the brakeman required him to perform the act. The witnesses were thus permitted to express the opinion that the act done by the plaintiff was required in the proper discharge of his duty, and that plaintiff was not chargeable with negligence because the act was required in the discharge of duty. But it was the province of the jury to determine whether the act was required of plaintiff in the performance of services imposed upon him, or whether such act could not have been done in another manner, attended by less danger. The witnesses could have explained to the jury the nature of the services rendered by plaintiff when he was injured, the performance of which was imposed upon him by his duty as brakeman, and the usual or customary manner of performing these services, but they ought not to have been permitted to express the opinion as to plaintiff's care or negligence.

The fault of the evidence is that the witness, by declaring that the particular acts of plaintiff done at the time—that is, the manner of the discharge of the services rendered—were required by the duty of the plaintiff, thus expressing the opinion from which the

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inference would be drawn that plaintiff was not chargeable with negligence. But the question of plaintiff's care or negligence in descending from the car cannot be determined upon the opinion of those familiar with the services in which he was engaged. It is not a proper subject for expert testimony. These conclusions are in accord with prior decisions of this court. See Hamilton v. Des Moines Valley Ry. Co., 36 Iowa, 31; McKean v. B., C. R. and N. Ry. Co., 7 N. W. Rep. 541.

3. The defendant offered evidence to show "that persons had frequently ridden on cars as broad as this one, between the cattle chute and the outside of the car, and that the cattle chute was the same then as it is now." This testimony was rejected; it ought to have been admitted.

Witnesses for plaintiff had testified that a man could not ride by the chute holding to the side of the car as indicated in the proposed evidence, and it was declared by more than one witness for plaintiff to be extremely dangerous. The testimony proposed tended to contradict the evidence introduced on this point by plaintiff, and to show that the cattle chute was not constructed in dangerous proximity to the side track. These matters were directly involved in the issues in the case.

4. Counsel for defendant insist that the ninth and tenth instructions given by the court are erroneous by the reasons that they recognize the theory of plaintiff's witnesses as to the care exercised by the plaintiff, and assume that defendant was negligent. The instructions direct the jury that if they find plaintiff was swinging to the side of the car, "and this was in the line of his duty, or was ordinary care and not negligence, they should find for plaintiff." The question of plaintiff's care was for the jury to determine; the court was not authorized to say that "swinging to the side of the car," as a matter of law, was negligence. If brakemen have no other way of reaching the ground than by climbing down the side of the cars, and if they are required to do so when the cars are in motion, they are not, as a matter of law, negligent in descending the cars in that manner. They can do so only by "swinging to the side of the car," which, therefore, does not constitute negligence per se.

While the instructions now under consideration do not inform the jury that plaintiff cannot recover unless defendant was negligent, yet such directions were explicitly given in other instructions —the third and fourth. It would have been better had the same thought found expression in these instructions. But as all the instructions are to be read together, and were so read by the jury, it is hardly probable that they were misled by the omission of the qualification under consideration from the two instructions complained of by counsel.

5. The defendant in the third and fifth instructions requested by

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its counsel, asking the court to instruct the jury that the defendant "had the right to construct its 'cattle chute' in such manner, and in such close proximity to the railroad track, as would best subserve its purpose, in safely loading and unloading live stock," and that defendant is not, therefore, chargeable with negligence in causing the injury sustained by plaintiff. These instructions were properly refused. The law requires defendant to exercise thought for the safety of its employees. Its care is not to be exhausted in providing for the safety of the cattle taken upon the train. Human life demands of it consideration.

6. The fourth instruction asked by defendant presents a correct rule. It is, in substance, that if the chute was constructed so as to be reasonably safe for employees operating trains, in a reasonable, safe, and prudent manner, defendant is not chargeable with negligence on account of the character and condition of the chute. The doctrine of this instruction is fairly presented by the seventh, given by the court. Its refusal was not, therefore, erroneous, though it may well have been given.

7. The instructions given by the court, we think, are correct. No objections thereto are urged in argument, except to the ninth and tenth, above considered. The instructions asked by defendant, so far as they are correct, are repetitions of those given.

For the errors in admitting and excluding evidence, above pointed out, the judgment of the district court is reversed.

Louisville and Nashville R. R. Co.

v.

Wolfe.

(*Advance Case, Kentucky.*)

In an action against a railroad company, plaintiff alleged that there was a hole in the platform connected with defendant's depot, of a dangerous character, and that the same was known to defendant, but that defendant had wilfully failed and refused to repair the same, and that while plaintiff was lawfully engaged about his business on said platform he had fallen down said hole, injuring himself, wherefore he claimed damages. Defendant answered that plaintiff had full knowledge of the hole, and, with his eyes wide open, in broad daylight, had walked into it, wherefore he was guilty of contributory negligence which precluded recovery. To this plaintiff replied, denying that he was guilty of contributory negligence. *Held*, that the reply, though it failed to deny the substantive facts alleged in the answer, was nevertheless good, inasmuch as the allegations of the answer only disclosed a state of things which might or might not amount to contributory negligence on the plaintiff's part.

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Defendant in the above cause requested the court to charge that it could not have been required to use ordinary care, or held to responsibility for a failure to do so, unless it failed to use such care after being aware of plaintiff's danger. *Held*, that, inasmuch as the defendant had, by its negligence in refusing to repair the hole, rendered it impossible for it or its agents to become aware of plaintiff's peril in time to avoid the injury done him, the refusal of the court to charge as above did not constitute error.

In such case the court is right in instructing the jury that their verdict must be confined strictly to compensatory damages.

Where an instruction is given to the jury at the request of a party to a cause, and he makes no objection and takes no exception to it, the court will not at his instance pass upon the correctness of said instruction on error.

APPEAL from Christian Circuit Court.

By the Court.—It is alleged in substance by the appellee that there was a hole in the platform connected with appellant's depot; that the opening and its dangerous character were known to the appellant, but it negligently, wantonly and wilfully failed and refused to repair it, and while removing a box of freight from said depot to his wagon, having necessarily to pass over said hole, he fell into it, and broke the left patella or knee cap of his leg, for which he prays damages.

From a judgment upon a verdict of $2000 in favor of appellee the appellant prosecutes this appeal, and raises the question, first, upon the pleadings, that the facts constituting contributory negligence which it pleaded were not denied, and therefore no verdict or judgment should have been rendered in appellee's behalf.

The allegation of the answer is "that the plaintiff had full knowledge of said defect, and with his eyes wide open, and in open broad daylight, walked into said hole, and by his own negligence contributed to said injury, and thereby he alone is responsible for his misfortune. To this the appellee replied that, "the plaintiff, Wm. R. Wolfe, for reply to defendant's answer, denies that he was guilty of any negligence at or before the time the injury complained of in his petition, or that he contributed in any way by his negligence to the occurrence of said injury. He denies that defendant is relieved from responsibility for their gross and wilful neglect, by reason of any negligence on the part of the plaintiff." It is contended by counsel that the reply fails to deny the substantive facts constituting contributory negligence, and only traverses the averment of negligence, which is but denying a legal conclusion. The error in this position lies in the assumption that the allegation of negligence is a mere legal conclusion, and that the supposed substantive facts constitute contributory negligence, neither of which is true. Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises, or by which contributory negligence is made out. It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a

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mere conclusion of law, and may be pleaded generally. Although the appellee, with his eyes open and in broad daylight, walked into the "hole," these facts alone would not constitute neglect, but if done intentionally or negligently they would do so. Nor does the fact that the appellee knew the "hole" was in the floor, when added to those named, constitute negligence, as want or absence of care must be averred in some form, as it is one of the essential facts necessary to such a defence. The issue formed by the reply was material. 42 Iowa, 378; 34 Mo. 235; 14 N. Y. 310; Bliss on Code Pleading, § 211.

It is urged that the provision to the second instruction was erroneous, because the defendant could not have been required to use ordinary care or held to responsibility for a failure to do so, unless it failed to use such care after being aware of plaintiff's danger. Many authorities are cited to sustain this view, but none of them are applicable to the state of facts before us. Where an accident or injury has been caused by the concurring and approximately simultaneous fault of both parties, neither can recover from the other unless the latter, after being aware of the peril, could, by the exercise of ordinary care, have avoided the injury, or the neglect was either wilful or gross. But in this case the facts admitted by the pleadings and clearly established by the evidence show that the appellant had, by its original act of negligence in permitting the opening in the floor to remain out of repair, rendered it impossible for it or its agents who were not present to become aware of appellee's peril in time to avoid the injury to him. It was, therefore, correct to instruct the jury that the ordinary care requisite to avoid the injury must have been exercised by the appellant, with reference to the original and construing act of negligence which existed before and was the approximate cause of the accident by which appellee's knee cap was broken and his leg injured. These views obviate the necessity of discussing instruction No. 4, which was asked by appellant and refused by the court, as it is opposed to the exposition of the law given in this opinion.

The third instruction confines the jury strictly to compensatory damages, and we have not been shown any error even in its verbiage, and certainly not in the law embraced by it.

As to the first instruction no objection was made or exception taken to it, and it was given at the instance of appellant, whose criticism of it cannot therefore be considered by this court.

We may suggest, however, that the clause objected to refers to negligence generally and not to any special kind of negligence, and says "it (negligence) may be gross or wanton and yet not intentional." This seems to be correct, and what the instruction really means.

Wherefore the judgment is affirmed.

See note, p. 634.

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P., C. AND ST. L. RY. CO.

v.

WRIGHT.

(*Advance Case, Indiana. April* 15, 1882.)

Where, in an action against a railroad company to recover damages for injuries done to the plaintiff's horses and wagon at a crossing on the defendant's road, the complaint substantially set out that the plaintiff before attempting to drive over the crossing stopped, looked and listened, but by reason of a deep cut on the defendant's line and intervening underbrush was unable to see an approaching train, and then upon endeavoring to drive over said crossing, which was slightly higher than the rest of the highway so as to impede the vehicle, was run down and driven over by an engine on defendant's road, which came through the cut above mentioned at a reckless rate of speed, viz., fifty miles an hour, giving no signal and making no sound to alarm the plaintiff, in consequence of which he was injured without any negligence on his part by the negligence of the company defendant.

***Held*, that said complaint did not contain anything from which contributory negligence on the part of the plaintiff could be inferred, and that it was therefore not demurrable on that ground.**

The averment in the complaint that plaintiff was without fault was a merely formal one, and admitted of any legitimate proof by which its truth could be established.

It is for the court by proper instructions to define negligence with reference to the facts of the case, and for the jury to say whether there was negligence.

Statements made by the driver of the vehicle injured in the above case about half an hour after the accident, *held* inadmissible as part of the res gestæ.

Where said driver had been called as a witness on the trial, but was not asked as to said statements, evidence of what they were is inadmissible in order to impeach his testimony.

Where the assignments of error embrace a refusal to permit a witness to answer a specified question, and the bill of exceptions discloses the fact that the real question asked was aliter than that set forth in the assignments, the court will not reverse, though the evidence was improperly rejected.

APPEAL from the Madison Circuit Court.

WOODS, J.—It is claimed that the court erred in overruling the appellant's demurrer for want of facts to the complaint of the appellee. The complaint is long and the giving of a copy is unnecessary. It charges the injury and destruction of two horses, harness and a wagon of the plaintiff at a highway crossing of the track of the defendant's road. It is charged in substance that at and on the north side of the crossing for a long distance the railroad track lay in a deep cut, and was also obscured and concealed by a growth of underbrush and timber on both sides of the track; that at the point of the crossing the defendant permitted the rails, ties, planks and boards of the crossing to be so much higher than the highway

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as to check and impede the speed of vehicles passing over; that on the 24th day of September, 1878, one John Wright, was lawfully attempting to drive plaintiff's team and wagon across the defendant's track at said point, when the defendant carelessly and negligently ran her locomotive and train upon them, demolishing the wagon and injuring the horses and harness to the plaintiff's damage, etc.; that said train was running at a dangerous, reckless and unusual rate of speed—to wit, fifty miles per hour—and when approaching said crossing the defendant's servants in charge negligently failed to give any signal or alarm by ringing the bell or blowing the whistle or otherwise, though they well knew the dangerous condition of the crossing, and never attempted to check or stop said train; that said injury was caused by the careless acts of the defendant as stated, and without any negligence on the part of the said Wright, or of the plaintiff; that within a short distance of the crossing said Wright stopped the team and looked and listened, but by reason of the concealed condition of the track he was unable to see, and on account of the negligent failure of the defendant's servants to ring the bell or sound the whistle he was unable to hear the train approaching, etc."

The complaint was clearly sufficient. There are no facts stated from which, as against the averment that the plaintiff and his servant were without fault, it can be inferred, as is contended, that the servant was guilty of contributory negligence. The averment that the plaintiff was without fault is of a technical character, and admits of any legitimate proof by which its truth can be established; and as a matter of pleading it makes the complaint good in that respect against all mere inferences of contributory negligence unless the inference arises as a necessary legal conclusion from the facts stated. See Town of Salem *v.* Galler (No. 7844, last term). So long as the facts stated do not force the legal conclusion that there was contributory fault, the averment that there was no such fault entitles the plaintiff to have it submitted to the jury as a question of fact whether there was such negligence.

It is for the court by proper instructions to define negligence with reference to the facts of the case, and for the jury to find whether there was negligence. Chicago and Alton R. R. Co. *v.* Parmell, 94 Ill. 448; Penn. Coal Co. *v.* Conlan, 101 —— ——; 25 Mich. 274.

The next point made is that the court erred in excluding proof of certain statements alleged to have been made by the driver Wright shortly after the accident as to the reason he did not see the train. The statements, if made at all, were made as much as half an hour after the occurrence and at a different place, and were therefore not admitted as part of the res gestæ. It is not pretended that Wright had any such relation to the plaintiff as that after the occurrence his statements were admissible as such against the plain-

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tiff. Wright was himself a witness on the trial, but it has not been suggested, or pointed out in the record, that he was questioned on the subject. There was therefore no foundation laid for impeaching him by proof of contradictory statements. Another alleged cause for a new trial is that the counsel erred in refusing to permit Charles D. Luce, a witness, to answer the following question: "Did you use all the means within your power to prevent the accident after you saw the wagon was about to attempt to cross the track in front of the train?" For support of this cause reference is made in the brief to the bill of exceptions, pp. 139, 140. It there appears that the court refused to permit a witness who had given his name as Charles D. Luce to answer the following question: "State what more you could have done than you did to prevent the accident after you saw the team was about to attempt to cross the track in front of the train." This question is perhaps more clearly permissible than the one set out in the motion for a new trial; but as the record stands we are not required to consider either. Burker *v.* Kelsey, 72 Ind. 51. It would not be justifiable in disturbing the verdict as contrary to the law on the evidence.

The judgment is affirmed with costs.

See note, p. 634.

TOLEDO, ETC., RAILWAY COMPANY

v.

BRANAGAN, ADMINISTRATRIX.

(*Advance Case, Indiana. October* 14, 1881.)

In an action against a railway company for occasioning the death of the plaintiff's intestate the complaint stated that the company defendant had constructed a culvert under its track at a point where said track crossed one of the streets of a city, and that it had left a portion of said culvert uncovered, so as to be dangerous to persons travelling on said street; that plaintiff's intestate while walking along said street, exercising due and reasonable care, fell into said culvert without fault or negligence on his part, receiving injuries from which he died; wherefore plaintiff claimed damages.

Held, that although it was fairly inferable from the allegations of the complaint that the deceased knew of the dangerous place into which he fell, yet that this only obliged him to use care and caution proportioned to the danger which he knew to be in his way; and that, therefore, from the facts, no irresistible presumption of contributory negligence arose which rendered the complaint demurrable.

Where one claims damages for injuries caused by the negligence of another no presumption arises that he is himself free from fault. In order to recover he must show due care on his own part. Where the circumstances point just as much to the negligence of the plaintiff as to its absence, or point in neither direction, he cannot recover.

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On the trial of the cause, the complaint in which is set forth above, the evidence showed that the deceased came home at night in great pain from an injury on the side and soon after expired. His wife took a pair of his shoes and found that they fitted impressions of feet in the soft mud of the culvert just under the opening. A woman passing near the culvert shortly before deceased came home heard a cry of pain which sounded as though it came from the culvert. The medical experts examined testified that the death of plaintiff's intestate might have been occasioned by a fall such as plaintiff claimed to have taken place. There was no other evidence as to how the accident occurred. *Held*, that the evidence failed to disclose the fact that the deceased had exercised due care and prudence, and that, therefore, plaintiff was not entitled to recover.

Whether the evidence was sufficient to enable the jury to infer that deceased had received the injury which caused his death by falling into the culvert not decided.

APPEAL from the Carroll Circuit Court.

C. B. Stewart for appellant.

Pollard & Applegate for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that the appellant is a corporation owning and operating a line of railway extending through the city of Delphi; that the corporation constructed a track across Washington street, a public street of said city, that in constructing said track the appellant constructed a drain and culvert under its track in said street at a point where the street was crossed by said track; that the drain was of the depth of six feet and of the width of five feet; that appellant negligently permitted a portion of the culvert across said drain to remain open and uncovered, leaving an uncovered space of such a character as to be dangerous to those who travelled upon said street; that the appellee's intestate, Thomas Branagan, while walking along said street at a point where appellant's track crosses, and "while exercising due and reasonable care, and without his fault or negligence on his part," fell into, and through, the opening in the said culvert, and received injuries from which he died. It is fairly inferable from the allegations of the complaint that the deceased knew of the dangerous place in the highway, and that he had many times passed and repassed the spot where the opening in the culvert was which made the street unsafe.

It is contended that the complaint is bad because the deceased went upon the highway with full knowledge of the existence of the dangerous culvert, and that he was therefore guilty of contributory negligence. It is undoubtedly true, as counsel assert, in language borrowed from a very old case, that, "a man must not cast himself upon an obstruction, which has been made by the fault of another, and to avail himself of it, if he do not himself use common and ordinary caution to be in the right." But the rule expressed in the quotation we have made does not go to the extent of holding that knowledge of the existence of a dangerous

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defect in a highway requires a traveller to keep off the highway altogether. If the danger of passing is so great that a man of ordinary prudence, possessing knowledge of its existence, would not attempt to pass it, then it might, perhaps, be contributory negligence for one acquainted with the location and character of the dangerous spot to attempt to pass in close proximity. Knowledge that there is a defect in a highway making it dangerous to attempt to travel upon it does not, of itself, make it negligence to use the highway carefully and cautiously. Knowledge of the existence of a dangerous place does, however, make it incumbent upon the traveller to use care and caution proportionate to the danger which he knows lies in his way. The fact that the injured person had knowledge of the dangerous condition of the highway is always an important matter for consideration, but it is not always sufficient to establish contributory negligence. City of Huntington *v.* Beers, this term; Clayards *v.* Dethick, 12 Q. B. 439; Reed *v.* Northfield, 13 Pick. 94; Humphreys *v.* Armstrong, 56 Pa. St. 204; Hutton *v.* Windsor, 34 Upper Can., Q. B. 487; Whittaker *v.* Baylston, 97 Mass. 273. The fact that the complaint shows that the appellee's intestate knew of the dangerous place in the street is not sufficient to overcome, or make nugatory, the explicit averment that the said intestate did exercise reasonable care and prudence, for it may well be true that he did exercise such prudence and care, although he had full knowledge of the dangerous defect in the street. There was no error in overruling the demurrer to the complaint.

The evidence showed that appellee's intestate lived about two hundred yards distant from the culvert where appellee alleges he received the injuries which caused his death; that he left his home some time between six and seven o'clock on the evening of the accident; that he returned between seven and eight; that immediately upon his return he complained of his left side; that physicians were sent for; that the pain was so great that the physicians were unable to make an examination, and that the deceased died about nine o'clock the same night. The only evidence showing, or tending to show, how the deceased received the injury from which he died is that of Mary Branagan, Jerry Dillon, Mary Daily, and the physicians. Mary Branagan says she gave Jerry Dillon the shoes of the deceased; and Jerry testified: "I work at the boot and shoe trade; I went to the culvert in question about an hour after Branagan's death; I found tracks in the culvert and measured them, and compared the measure with a pair of shoes I got at the house; they seemed to agree. The bottom of the culvert was sand and clay mixed; I saw other marks that looked like hand marks, but I cannot say." Mary Daily testified that she was on the street on the night of Branagan's death; that when not far from the railroad track on her way home she heard some one cry

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out in pain, and thought it sounded like a call for help, and also that the cry sounded as if it came from the culvert. The physicians testified as to the death of Branagan; that they made a post-mortem examination, and that his death resulted from rupture of the spleen. Dr. Richardson said that there was a small mark on the heart of Branagan; that he could not say that the infliction of the injury which made the mark caused the rupture, but that it might possibly have done so. In answer to a question of appellee's counsel as to whether a person falling into a culvert would likely receive such an injury as that which caused Branagan's death, he said: "It might, though not necessarily; my judgment is he fell against something." The testimony of Dr. Smith, who assisted at the autopsy, is substantially the same as that of Dr. Richardson. It is earnestly argued that this evidence does not show that appellee's intestate fell through the culvert, but we do not find it necessary to decide this question, for we think the evidence is plainly insufficient upon another material point.

The deceased knew of the location and character of the culvert. The dangerous place was so situated with reference to the adjacent parts of the highway that one acquainted with the culvert and its surrounding might, by exercising ordinary prudence and care, readily have passed the place in entire safety. There is not a syllable of testimony showing what Branagan was doing, or how he was conducting himself at the time he received the injury which caused his death. If it be granted that there were circumstances from which it could be inferred that Branagan did receive his injuries from a fall into appellant's culvert there are certainly none from which it can be inferred that he was exercising reasonable care. Whatever might be the fair inference if Branagan had been unacquainted with the culvert and its surroundings, it cannot be inferred,—as against the facts that he did have knowledge, and that a man using due care might easily have travelled the highway in safety—that he was free from fault. The mere fact that he actually fell into the culvert would not itself supply evidence that he was, at the time he fell, exercising reasonable care.

There is no presumption that one who claims damages for injuries caused by the negligence of another was himself free from fault. In Cardell *v.* N. Y., etc., R. R. Co., 75 N. Y. 330, it is said: "Where one has been killed by the negligence of another, the circumstances must show due care on his part. Where the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited." Wharton on Negl., § 421. In Warner *v.* R. R. Co., 44 N. Y. 465, the court used this language: "It is the duty of the plaintiff to prove, and the right of the defendant who is charged with negligence causing an injury, that he should prove, by satisfactory evidence, that he did not contribute to the injury

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by any negligence on his part. This proof in some form constituted a part of the plaintiff's cause. It cannot be presumed that the plaintiff is free from fault." It is unnecessary, however, to multiply citations, for the rule has been long and firmly settled in this State that the evidence must show that the plaintiff in actions to recover for an injury resulting from the negligence of another, was himself free from contributory negligence.

The evidence in this case fails entirely upon this point. There is not simply a conflict of evidence; there is an utter failure of proof. There is neither direct testimony, nor circumstantial evidence, tending to prove that the appellee's intestate was without fault.

The court erred in overruling appellant's motion for a new trial.

Judgment reversed at costs of appellee.

The rule as to the burden of proof with regard to contributory negligence differs materially in the different States of the Union. In many of them it is held that the burden is entirely upon the defendant to prove the contributory negligence. Where this is the case, no express allegation of freedom from such negligence need be made in the plaintiff's complaint or declaration. And unless the state of facts there averred by him, or proved at the trial, necessarily shows him to be in fault, he has made out a prima facie case, provided of course he avers or shows negligence on the part of the defendant. Such is the law in Alabama: Smoot *v.* Wetumpke, 24 Ala. 111. California: Gay *v.* Winter, 34 Cal. 153; Robinson *v.* Western Pacific R. R. Co., 48 Cal. 409; McGuilken *v.* Central Pacific R. R. Co., 50 Cal. 7. Kentucky: Louisville & Nashville R. R. Co. *v.* Wolfe, supra, p. . Maryland: Froch *v.* P. W. & B. R. R. Co., 39 Md. 574. Minnesota: Hocum *v.* Weiderick, 23 Minn. 152. Missouri: Thompson *v.* North Mo. R. Co., 51 Mo. 190; Hocks *v.* Pacific R. R. Co., 65 Mo. 34; Scheurman *v.* Missouri R. Co., 3 Mo. App. 565. Kansas: Kansas, etc., R. Co. *v.* Painter, 14 Kan. 37. New Jersey: New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166, S. C. 33 N. J. L. 434. Pennsylvania: Weiss *v.* Penna. R. R. Co., 79 Pa. St. 387; Penna. R. R. Co. *v.* Weber, 76 Pa. St. 157, S. C. 72 Pa. St. 27. Wisconsin: Prideaux *v.* Mineral Point, 43 Wis. 513.

In other States it is held that the plaintiff is himself bound to show affirmatively that he has been free from contributory negligence. He must, therefore, insert a special allegation to that effect in his complaint or declaration, or else must set forth such a state of facts therein as will clearly show that he was without fault. The same remarks hold true as to what it is essential for the plaintiff to prove on the trial of the cause.

This is the law in Connecticut: Beers *v.* Housatonic R. R. Co., 19 Conn. 566; Park *v.* O'Brien, 23 Conn. 339; Fox *v.* Glastenbury, 29 Conn. 204. Illinois: Galena, etc., R. R. Co. *v.* Fay, 16 Ill. 558; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; Kepperley *v.* Ramsden, 83 Ill. 354. Indiana: Evansville, etc., R. R. Co. *v.* Dexter, 24 Ind. 411; Evansville, etc., R. R. Co. *v.* Hiatt, 17 Ind. 102; Pittsburg, etc., R. R. Co. *v.* Vinings' Adm., 27 Ind. 513; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Jackson *v.* Indianapolis R. R. Co., 47 Ind. 454; Cincinnati, Wabash & Michigan R. R. Co. *v.* Peters, supra, p. ; P. C. & St. Louis Ry. Co. *v.* Wright, supra, p. ; Toledo, etc., R. R. Co. *v.* Branagan, Admx., supra, p. . Iowa: Rusch *v.* Davenport, 6 Iowa, 443; Carlin *v.* Chicago R. R. Co., 37 Iowa, 316; Patterson *v.*

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Burlington, etc., R. Co., 38 Iowa, 279; Way v. Illinois, etc., R. Co., 40 Iowa, 341; Murphy v. Chicago, etc., R. Co., 45 Iowa, 661. Maine: Perkins v. Eastern R. R. Co., 29 Me. 307; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Gleason v. Bremen, 50 Me. 222. Massachusetts: Lane v. Crombie, 12 Pick. 177; Gaynor v. Old Colony R. R. Co., 100 Mass. 208; Murphy v. Deane, 101 Mass. 455; Allyn v. Boston, etc., R. Co., 105 Mass. 77; Lane v. Atlantic Works, 107 Mass. 174; Prentiss v. Boston, 112 Mass. 43; Hinckley v. Cape Cod R. R. Co., 120 Mass. 257. Michigan: Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; and Mississippi: Vicksburg v. Hennessy, 54 Miss. 391.

In New York the point seems to be unsettled. The following cases incline to the latter of the views above stated:

Warner v. N. Y., etc., R. Co., 44 N. Y. 465; Curren v. Warren, etc., Mfg. Co., 36 N. Y., 153; Burke v. Broadway, etc., R. Co., 34 How. Pr. 239; Gillespie v. Newburgh, 54 N. Y. 468. But there are many authorities which point in the opposite direction.

Johnson v. Hudson River R. R. Co., 20 N. Y. 65; Robinson v. N. Y., etc., R. Co., 65 Barb. 156; Burton v. Hudson River R. R. Co., 18 N. Y. 248.

The recent case of Show v. Jewett, supra, p. , seems to indicate that the latter line of authorities is now regarded with greater favor.

See also upon this point Barber v. Essex, 27 Vt. 62; Hyde v. Jamaica, 27 Vt. 443; Hill v. New Haven, 37 Vt. 501; Walker v. Westfield, 39 Vt. 246; Moore v. Shreveport, 3 La. Ann. 645; Walker v. Herron, 22 Tex. 55; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; Railroad Co. v. Gladman, 15 Wall, 401.

Little Rock and Ft. Smith Ry. Co.

v.

Pankhurst, Adx.

(36 *Arkansas Reports*, 371. *November Term*, 1880.)

It is well settled that "one who is injured by the mere negligence of another cannot recover, at law or equity, any compensation for the injury if he, by his own or his agents' ordinary negligence, or wilful wrong, contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence."

It is within the discretion of the circuit court to require, or not, the jury to find specially upon particular questions presented by counsel at the trial.

Appeal from Pulaski Circuit Court.

Hon. M. L. Rice, Special Judge.

Clark & Williams, for appellant:

Appellant only bound, under the circumstances in evidence, to

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avoid malicious or reckless injury. Johnson *v.* Boston & Maine R. R. Co., 125 Mass., 75; Morrissey *v.* Eastern R. R. Co., 126 Mass., 8 Cent. Law Journal, 385; Mulhern *v.* R. R. Co., 81 Penn. St., 366; Wharton on Negligence, sec. 388, a; Shearman & Redfield on Neg., secs. 10, 11. Failure to have light in front, no negligence, unless the accident were the natural and probable result of the omission. Sh. & Red. on Neg., secs. 6, 8 and 10; Bellefontaine R. R. Co. *v.* Sneider, 18 Ohio St. 399; Greenland *v.* Chaplin, 5 Exch. 243; McGrew *v.* Stone, 53 Penn. St. 436; Wharton on Neg., sec. 97; McGee *v.* Cairo, 9 Cent. Law J.—.

The facts being undisputed, question of negligence was one of law, and court should have directed a verdict for defendant. Morgan *v.* Duffie, 9 Cent. Law J. 12; ib. 102; Proffatt on Jury Trials, secs. 351, 352, 354; 64 Mo. 267; ib. 484; Shear. & Red. on Neg., sec. 11; 42 Mo. 193; 27 Barb. 221; 11 Ired. (N. C.) Law, 16; ib. 247; ib. 640; Ired. Law, 402; 1 Bosw. 357; 52 Penn. St. 282. Omission to do an act not positively enjoined, not subject of a suit. Whart. on Neg., secs. 82, 388, a; 125 Mass. 75. Even if law had required the head-light, omission not actionable unless it caused the injury. Wharton, 384, and cases cited; 40 N. Y. 9; Shear. & Red. on Neg., 8, 13, a.

Not necessary to show contributory negligence, until positive negligence first made out against defendant. Failing that, defendant entitled to verdict. Shear. & Red. on Neg., sec. 11, and cases cited; Morgan *v.* Duffie, 9 Cent. Law J.—; O'Donnell *v.* M. T. R. R. Co., 8 ib. 414; 9 ib. 102; 9 Mo. 113; 4 Otto, 278, 284; 21 Wall. 448; 22 ib. 121; 11 Howard, 373; 10 Wall. 637; 5 Otto, 697; 9 ib. 201; 11 Mo. 114; 26 ib. 202; 40 ib. 131; 36 ib. 484; 64 Mo. 267; 58 Maine, 389; 9 Otto, 272; 18 N. Y. 425; 24 ib. 433; 25 Mich. 274; 53 Penn. St. 436; 7 Otto, 319.

On general question of negligence: Shear. & Red. on Neg., secs. 25, 26, 482, 493; 26 Ark. 3, 6; 10 Mer. & Well. 546; 4 Ind. (95) App.; 1 Abb. N. Y. (Brooks *v.* Buf. & Niagara Falls R. R.); 9 Ind. 397; 3 Ohio St. 172; 47 Ill. 408; 2 Du Val, 114; 43 Mo. 380; 43 N. Y. 75; 4 ib. 349; 47 Penn. St. 300; 2 Neb. 319; 81 Penn. St. 366; 13 Ill. 585; 46 ib. 74; 45 Iowa, 29; Wharton on Neg., sec. 388, a; 125 Mass. 75; Morrissey *v.* Eastern R. R. Co., 126 Mass. —; 64 Mo. 267; 47 Ill. 408; ib. 414; 96 Mass. 429; 3 Thompson, etc. (N. Y.) 513; 1 Hun, 417.

Jury should have found specially upon interrogatories propounded by defendant (Gantt's Digest, sec. 4679), and special verdict controls. 33 Mich. 251; 43 Ind. 553; 20 Kan. 14; 18 ib. 195; 53 Ind. 176; 54 ib. 487; 12 Ct. of Claims (N. S.) 565; 76 N. C. 10; 52 Ind. 505; 45 ib. 67; 47 ib. 461.

M. W. Benjamin, for appellee:

Negligence, a question for the jury. Miss. Cent. R. R. Co. *v.*

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Mason, 51 Miss. 234; End. *v.* St. Paul, 22 Minn. 443; 56 Ga. 457; 34 ib. 330; 83 Ill. 415.

This court will not reverse on weight of evidence, even in favor of preponderance. Ark. Repts. (passim).

First and second instructions given, based on Barker & Wife *v.* L. R. & Ft. S. R. R. Co., 33 Ark. 350. Third, of similar import.

Gross negligence not in question. Road bound to use ordinary care. 33 Ark. 350; 50 Mo. 465; 60 ib. 477; 5 Mo. App. 435. To keep proper watch, such as prudence would dictate: Cases supra, and 13 Bush. 122.

Further, as to negligence being matter of fact. 17 Wallace, 660; 60 Ga. 441; 22 Minn. 443; 36 Ga. 437; 34 ib. 330; 31 Miss. 234; 83 Ill. 205.

Sec. 4679 of Gantt's Digest discretionary with the judge.

HARRISON, J.—This was an action by Mary Pankhurst, administratrix of William H. Pankhurst, against the Little Rock and Fort Smith Ry. Co. for causing the death of her intestate by the negligent management of its train.

The defence was that the death of the deceased was occasioned by his own negligence and not by that of the defendant.

There was a verdict for the plaintiff for $1,685. The defendant moved for a new trial, and the motion being overruled, appealed.

It appears from the evidence, which was in no material part conflicting, that the deceased, who lived on or near the defendant's road, about eight miles from Little Rock, had, on the day of the accident, which was the fourteenth of October, 1876, been to Little Rock, and was, when it happened, on his way home. He was walking on the railroad track on which was a well worn path and was drunk and staggering, and when within about four miles of his home, and about dark, he fell and lay upon the track, and a passing construction train, about 8 o'clock in the evening ran over and killed him.

The regular train had passed some time before he fell upon the track. The construction train was slowly backing down from Warren station to Argenta, and frequently stopping to distribute timbers along the track. The tender was in front of the engine, and there was no light on the tender or in front, except from the engine fire and sparks, which could be seen in front, but was somewhat obstructed by the tender, and the night was dark and cloudy, but the train could be heard a quarter of a mile, and seen some distance, and in ample time to allow a person on the track to get off before it passed.

There was where the deceased was killed no crossing or public way over the track, and no one on the train saw the deceased on

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the track, or knew of his being run over and killed until the next morning.

The plaintiff asked the following instructions to the jury, which the court gave against the objection of the defendant:

"1. Railroad companies, owing to the dangerous character of the business they engage in, are held to the greatest care in the operation of their locomotives and machinery, and if you find from the evidence that the defendant's agents or servants in running the locomotives and cars failed to use such care or caution, you will find for the plaintiff, if you further find that the deceased was killed by the defendant's cars when the killing might have been prevented by the use of such diligence, and without his negligence being the proximate cause.

"2. If you believe from the evidence that the deceased was in fault in walking on defendant's track, and while walking on it was killed by the defendant's engine or cars, but that defendant's agents were aware, or ought, by the use of ordinary diligence, to have been aware of the fact, that he was on the track in time to avoid killing him by the use of reasonable diligence, the failure to use such diligence alone must be considered the proximate cause of the injury; and in that event you should find for the plaintiff.

"3. If the defendant knowingly permitted its track to be used as a foot-path by the public generally for years, and made no objection to its being so used, such permission or acquiescence required the defendants to use ordinary care, prudence and diligence, at all times, in running its engines and cars, to avoid injury to footmen thus upon its track; and if you believe that the defendant failed to use ordinary care, prudence and diligence, to avoid injury to the deceased while thus upon its track, you will find for the plaintiff."

The first contained an ambiguous expression which rendered its meaning uncertain and may have misled the jury.

Whilst it is true that greater care is demanded of a railroad company in the operation of its locomotives and trains than is required in the use and control of less ponderous and dangerous agencies, yet toward strangers or persons to whom the company has assumed no direct obligation or duty, it is but that ordinary care which a sensible, prudent man would take under all the circumstances of each particular case. As remarked by Mr. Justice EAKIN, in the case of the St. Louis, Iron Mountain and Southern Ry. Co. *v.* Freeman, ante: "This ordinary care imposed upon railways to be exercised by their employees, varies with the circumstances, and the subject matter endangered. For example, ordinary care would require more precaution in running through the streets of a village, or populous neighborhood at night than through vast outlying forests or prairies in daylight, and it is the instinct of humanity, as well as a rule of law, that everywhere ordinary care requires more precautions against endangering the lives of persons than of cattle;

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still it is ordinary care in each case; which means such care as persons of ordinary prudence would use in similar circumstances. St. Louis, Iron Mountain and Southern Ry. Co. *v.* Vincent, ante; Little Rock and Fort Smith Ry. Co. *v.* Barker, 33 Ark. 350; Isabel *v.* Hannibal and St. Joseph R. R. Co., 60 Mo. 475; Brown *v.* Hannibal and St. Joseph R. R. Co., 50 Mo. 461; Brand *v.* Schenectady and Troy R. R. Co., 8 Barb. 368; Shear. & Redf. on Neg., sec. 7.

It is the well settled doctrine, as laid down in Shearman & Redfield on Negligence, that "one who is injured by the mere negligence of another cannot recover at law or equity any compensation for his injury, if he by his own or his agent's ordinary negligence or wilful wrong contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault, the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." Shear. & Redf. on Neg., sec. 25; Whar. on Neg., secs. 300, and 388, a; St. Louis, Iron Mountain and Southern Ry. Co. *v.* Freeman, supra; Harvey *v.* Rose, 26 Ark. 3; Brand *v.* Schenectady and Troy R. R. Co., supra; Johnson *v.* Boston and Maine R. R., 125 Mass. 75; Morrissey *v.* Eastern R. R., 126 Mass. 377; Evansville and Crawfordsville R. R. Co. *v.* Hiatt, 17 Ind. 102; State *v.* Railroad, supra; Isabel *v.* Hannibal and St. Joseph R. R. Co. supra.

Though we think there was negligence in the defendant, in not having a light upon the tender and a lookout in front (for cattle or stock, if not persons, might be anticipated to be on the track), yet the deceased's own negligence in being voluntarily on the track, and from intoxication unable to get out of the way of the train, was the proximate cause of his death. The second and third instructions therefore did not state the law correctly.

The defendant also asked instructions substantially the converse of those given for the plaintiff, the refusal to give which was a ground of the motion for a new trial; but as the questions raised by them are sufficiently answered in what we have said in regard to those given for the plaintiff, it would be useless to notice them.

The court was asked by the defendant to require the jury to find specially upon particular questions of fact stated, which the court declined to do, and its refusal was made another ground of the motion for a new trial.

We are of the opinion that the matter was within the sound discretion of the court, and it might, or might not, as it deemed best, submit the questions to the jury. The language of the provisions of the Code under which the application was made is as follows:

"In all actions the jury, in their discretion, may render a general

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or special verdict, but may be required by the court, in any case in which they render a general verdict, to find specially upon particular questions of fact to be stated in writing." Gantt's Digest, sec. 4697.

Such requirement may be very proper in some cases, but wholly useless and unnecessary in others, and only the court trying the case can judge of the expediency of it.

For the error in giving the plaintiff's instructions the judgment is reversed, and the cause remanded.

See note, vol. 6, p. 17.

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INDEX.

ASSESSMENT.
See TAX.

ASSIGNEE OF A CONTRACT, LIABILITY OF, I.
See CORPORATION, 1-7.

BOARD OF EQUALIZATION.
See TAX.

BONA-FIDE HOLDER OF BOND, 145.
See BOND, 6-8.

BOND.
1. In a suit to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company to show affirmatively that the issue of the bonds was authorized by a vote of the people, had, pursuant to a law providing therefor, prior to the adoption of the present constitution, and the law under which the election is held must be substantially complied with, or the election will confer no authority. Chicago, etc., R. R. Co. *v.* Mallory, 139.
2. Where a law for an election to determine whether a subscription, etc., shall be made by a town to aid a railroad corporation, provides that "such election shall be held and conducted, and returns thereof made, as is provided by the Township Organization law in towns organized under said law," an election held on the question, as in the case of an ordinary town meeting, presided over by one moderator only, with only one clerk, is void, and will confer no authority to issue the bonds of the town. Such a provision requires the election to be held by three judges and two clerks, as in general elections. The words "town meeting," and the word "election," as used in the Township Organization law, are not convertible terms. Id.
3. The words "town meeting" have a definite and well settled meaning in the Township law, and are always used to describe the annual town meetings of the electors of the town for the purpose of electing town officers, and transacting such other business as the electors are authorized to transact, or special meetings of the electors for such purposes called pursuant to law. Such meetings are clearly distinguishable from "elections," when there is no other business transacted but to elect officers. Id.
4. The act of Missouri, of January 4, 1860, authorizing the inhabitants of a certain "strip of country" to subscribe to the stock of a railroad passing through it, and to levy a tax to pay the subscription, does not authorize the issuing of bonds to pay such subscription by so anticipating the tax. Ogden *v.* Daviess Co., 145.
5. Neither the act of March 3, 1868, amended March 24, 1870, authorizing "municipal townships" to pay former subscriptions to railroad stock in bonds, nor the act of March 24, 1868, authorizing "counties, cities and towns" to do the same, authorizes the issue of the above-mentioned bonds, as these acts apply only to such public corporations as entireties, and not to a "strip of country" containing the aggregation of many parts of such townships, etc. Id.
6. The issue of such bonds being wholly unauthorized, and ultra vires, they are void even in the hands of a bona-fide holder.

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BOND—*Continued.*

7. There can be no bona-fide holder of town bonds within the meaning of the law applicable to negotiable paper, as they can only be issued by virtue of special authority conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute. Cagwin *v.* Hancock, 150.

8. All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, must see to it that its provisions were complied with; and in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith, does not preclude the town from showing that they were illegally issued. Id.

9. Under the provisions of the act of 1866 (§ 2, chap. 398, N. Y. L. of 1866) authorizing certain towns to subscribe for the stock of the N. Y. and O. M. R. R. Co., and to issue bonds for moneys borrowed to pay therefor, provided the consent in writing of a majority of the tax-payers, owning more than one-half of the taxable property of the town shall first have been obtained, and provided that the fact that such majority has been obtained, " shall be proved by affidavit, in writing," of one of certain specified town officers, and declaring that such affidavit " or a certified copy thereof shall be evidence of the facts therein contained," the affidavit is not conclusive, but only prima-facie evidence of the facts and may be disputed. Id.

10. Accordingly held, in an action to recover the amount due upon certain interest coupons cut from bonds issued by railroad commissioners appointed for defendant under said act, and which had been purchased for value and in good faith, that defendant was not precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the tax-payers of the town had not been obtained. Id.

11. The court is inclined to hold that the act of February 28, 1869, amendatory of the charter of the Illinois South-eastern Ry. Co., in so far as it authorizes towns, etc., along or near the route of the road to subscribe to the stock of the company, or make donations and issue bonds therefor, is in violation of section 23, art. 3, of the constitution of 1848, which declares that no private or local law shall embrace more than one subject, which shall be expressed in the title. Welch *v.* Post, 158.

12. Making donations to railway companies and issuing interest-bearing bonds in payment thereof, are not among the usual or implied powers possessed by municipal corporations, and without express power given by statute to issue such bonds they will be void in the hands of any and all persons. Id.

13. Where a railway charter authorized any incorporated city or town on the line of the proposed road to make donations to the company, not exceeding $10,000, to be paid by immediate taxation, giving no power to issue bonds in payment, and an amendment to the charter named villages, counties and townships as corporations to which power was given, on a vote of the people, to make donations to the proposed railroad, and to issue interest-bearing bonds in payment thereof: *Held*, that bonds issued by an incorporated town after the passage of the amendatory act of 1869, upon a vote for a donation to the railway company, were illegal and void, being issued without sanction of law. The word town being omitted from the act authorizing the issue of bonds, cannot be supplied by judicial construction. Id.

14. While it may be that a court of chancery has no jurisdiction to declare municipal bonds void which are held by non-residents who do not appear in the suit, yet the court has jurisdiction as to any such holder who appears and contests the bill on its merits, and also to enjoin the local officers from the collection of taxes, to pay such bonds or the interest thereon. Id.

15. The recital in the entry of a board of county commissioners, ordering an election in a township upon a petition therefor to vote aid for the construction of a railroad, "and proof being made that twenty-five of the petitioners are freeholders of Clinton township," is sufficient to show that such board found that the petition was signed by twenty-five freeholders of the particular township of their own county, and the mere fact that such recital was interpolated

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BOND—*Continued.*
after the other parts of the entry had been completed does not affect the validity of the entry or the part interpolated. Goddard *v.* Stockman, 165.

16. While it is the better practice that the record of the proceedings of a board of county commissioners should be signed by the members thereof, yet unsigned orders of the board are not void, and, when properly signed within a reasonable time, become valid from the time when made. Id.

17. A petition asking for an appropriation to aid in the construction of a railroad is not invalid for the reason that it does not ask for the annexing of conditions to the appropriation. The act of March 8, 1879, Acts 1879, p. 46, enables petitioners and voters to annex conditions to appropriations, but does not compel them to do so if they do not desire any conditions. Id.

18. While the law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and inquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court, and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof. Id.

19. If, in such case, the one per cent levied for the current year amounted to less than one half of the amount of the donation asked, the remedy therefor is by appeal from the order whereby the levy was made. Id.

20. The recital in the record of the order of the board of commissioners making such an appropriation, that "it is hereby ordered that a special tax of one per cent be, and the same is hereby levied, . . . for the purpose of raising one-half of the amount specified in said petition," is a sufficient granting of the prayer of the petition. Id.

21. If, in making the levy for such donation, certain taxable property of the township was omitted from the assessment, the tax upon all other property that has been assessed is not thereby rendered invalid. Id.

22. Where bonds of a corporation which have passed into the hands of a bona fide holder recite on their face that all the conditions precedent to their lawful issue have been complied with, this recital is conclusive and binding on the corporation. Co. of Clay *v.* Society for Savings, 170.

23. The want of performance of conditions precedent is a matter of defence for the corporation to allege and prove, in case of suit on the bonds. Id.

24. The general statute of Illinois of November 6, 1849, in relation to county subscriptions to railroad stock, is not repealed, so far as it concerns the Illinois South-eastern Ry. Co., by section 7 of the act of February 26, 1867, to incorporate that company; i.e., by these two acts a county is not forbidden to subscribe to the capital stock as well as to make a donation to the said company. Id.

25. Nor are the above acts repealed, so far as they concern the said company, by section 10 of the amendatory act of February 24, 1869. Id.

26. Where a donation by a county to a railroad had been voted and the donation made on the books of the railroad previous to 1870, and the company had by that time partly done the work required by the county as a condition, this created a contract between the railroad and the county; and the bonds issued after 1870 to carry out that contract are not invalidated by the provisions of the Illinois Constitution of 1870 forbidding such subscription. Id.

27. The payment of interest on its bonds for a long period is a waiver by the corporation of irregularities in their issue, when sued on by a bona fide holder for value. Id.

28. Section 7 of chapter 90 of the Kansas Laws of 1870, p. 90 (and of chapter 84, Comp. Laws of 1879, pp. 796, 797), so far as it attempts to divert any portion of the general county tax or general township tax to the payment of a certain class of township railroad bonds, is void, being in contravention of section 4 of article 11 of the constitution, which provides that "no tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same;

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BOND—*Continued.*
to which object only such tax shall be applied." National Bank *v.* Barber, 181.
29. Under the Illinois constitution of 1848, the legislature could properly confer upon a city the power to incur indebtedness and issue its bonds for a corporate purpose, without any vote of the people, but it could go no further. It could not compel a city or incorporated town to incur a debt, unless the legislative department of the city or town saw proper to do so. Chicago, etc., R. R. Co. *v.* Aurora, 191.
30. Where an act conferring power upon a city council to incur an indebtedness and issue its bonds therefor is silent in regard to the time when the bonds shall be made payable, and in regard to the terms and conditions upon which they shall be payable, such matters will be left to the city and the person to whom the bonds are to be issued, to be settled, and when agreed to, the city may make the payment of such bonds depend upon conditions mutually assented to. Id.
31. Where a bond contains two conditions, one authorized by law and good, and the other unauthorized and bad, and the conditions are in their nature severable, the latter may be rejected and the other held good and the bond sustained. Id.
32. The city of Aurora, under an act of the legislature authorizing it to issue its bonds as a donation to a railway company to secure the location of its machine shops in the city, passed an ordinance for the issue of such bonds, to be conditioned that both the principal and interest should be paid out of moneys to be raised by special tax, to be levied and collected of property in the east division of the city, and that if such a tax could not be legally assessed, the obligees should procure the passage of a law authorizing the levy of such a special tax, and that if any of the conditions were not fulfilled, the bonds should be void. Under this ordinance the city issued her bonds, conditioned as the ordinance required. It was contended by the holder of the bonds, that the condition being void, for the reason the city could not, under the constitution, levy and collect a special tax except over its entire territory, therefore the bonds were payable as though there was no condition: *Held*, that the conditions were such as the city had the right to impose, and it being the intention of the parties that they should not be obligatory if the conditions could not be performed, the bonds were not collectable. Id.
33. In the construction of all written contracts, the controlling consideration always is to arrive at the intent of the parties, and in doing this every part of the instrument is to be considered and properly weighed. So the condition of a bond may be considered to explain the obligatory part. Id.
34. In actions brought to restrain defendants from transferring, and to compel the cancellation of bonds issued by plaintiff under the act of 1869 (chap. 314, N. Y., L. of 1869), authorizing it to subscribe for stock of the C. L. R. R. Co., it appeared that revocations of consents of tax-payers of the town, executed and acknowledged with the same formalities as the consents, were delivered to the assessors while they had the consents before them, and before they had acted upon them, and that the residue were insufficient to constitute the majority required by the statute; also that the assessors disregarded the revocations and wrongfully made and filed the statutory affidavit. *Held*, that the omission to file the revocations did not render them ineffectual; that their delivery made them effectual and withdrew from the assessors the authority to make the affidavit. Springport *v.* Teutonia Sav. Bank, 199.
35. Also, *held*, that such omission did not estop the plaintiff; that, assuming the tax-payers, who signed consents, and then revoked them, could be estopped by their acts or omissions, they could not estop the whole body of tax-payers. Id.
36. Also, *held*, that a tender, before the commencement of the action, of the stock received for the bonds was not necessary; that defendants could not require a tender to themselves, as they were not received from them and they had no title thereto. If they had any right to them (as to which quære), all they could claim was an equitable right of subrogation on cancelling their bonds; if the claim was that the stock should have been surrendered to the

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BOND—*Continued.*
company or cancelled, that was a matter between it and plaintiff, and the rights of the latter as against defendants did not depend upon the prior adjustment of the matter. Id.

37. It seems that in an action against a third party, whose title depends upon a contract claimed by plaintiff to have them rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract of a return of what plaintiff received. Id.

38. Also, *held*, that the affidavit of the assessors was not conclusive, but only prima facie evidence of the facts therein stated. Id.

39. Where a statute authorized a town to subscribe to the capital stock of a railroad and to issue bonds to pay for such subscription, and prescribed that the subscription should be made by commissioners, who were to execute the bonds under their hand and seal, the failure to affix seals to the bonds did not invalidate them, the requirement as to seals being merely directory and a matter of form, not of substance. Draper *v.* Springport, 205.

40. The board of commissioners of a county in Alabama, when ordered by mandamus to levy and cause to be collected a tax, held a meeting, levied the tax, ordered the tax collector to collect it, and so far set the machinery of collection in motion that it depended on the tax collector alone to collect it, and, on his failure so to do, informed the governor of the State of the fact, the duties imposed on them by the State statutes were fully performed; an order committing them for contempt for not causing the collection of the tax was coram non judice and void, and a habeas corpus was granted to release them from imprisonment. Rowland, ex parte, 208.

41. A judgment upon the merits dismissing an action brought by certain tax-payers of a county against the county commissioners to enjoin the issue by them of certain railroad aid bonds, is an estoppel to a subsequent action after the bonds have been issued, brought in the name of the State upon the relation of certain other tax-payers of the same county, against the county commissioners, the railroad company and purchasers of the bonds, to have the bonds adjudged illegal and void. State *v.* Chester, etc., R. R. Co., 220.

42. A county having issued certain railroad aid bonds after a decree of the court had determined that the county had the power to do so, all persons purchasing such bonds became privies to the decree, and may rely upon its estoppels. Id.

43. In the South Carolina State constitution there is no restriction which deprives the legislature of the power to authorize counties to incur obligations and issue bonds for their payment. Id.

44. Where a town board of supervisors is authorized by law to issue bonds in aid of a railroad only upon the presentation of a petition therefor signed by a certain number of tax-payers of the town, the procuring and affixing of such signatures on Sunday is "business," and is unlawful, and confers no authority upon the supervisors to issue such bonds. De Forth *v.* Wisconsin, etc., R. R. Co., 28.

45. The fact that plaintiff affixed his signature on Sunday will not prevent him from obtaining an injunction against the issue of the bonds on the ground that the required number of signatures were not affixed on any secular day, where he did not on any secular day authorize the presentation of such petition to the supervisors, and where nothing had been done by the railroad company to earn the bonds before it was notified that plaintiff would resist their issue and denied the validity of such signature. Id.

46. The complaint for an injunction in such a case need not aver that the persons who signed the petition on Sunday were not of the class described in sec. 4596, R. S., as persons "who conscientiously believe that the seventh day or any other day of the week ought to be observed as the Sabbath," etc. Id.

See CORPORATION, DEBTOR AND CREDITOR, 1–3.

BRIDGE, 295.

See EMINENT DOMAIN, 16.

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CARRIER, 1.
See CORPORATION, 1-7, 12-14.

CHATTEL MORTGAGE, 114.
See TAX, 15.

CITY, LOCATION AND CONSTRUCTION OF RAILROAD IN, 253.
See CONTRACT, 2; EMINENT DOMAIN, 3-8, 11-13, 44, 60; PLEADING AND PRACTICE, 7, 8.

CONNECTING LINES, 1.
See CORPORATION, 2.

CONSOLIDATION OF RAILROAD, 378.
See EMINENT DOMAIN, 53.

CONSTITUTIONAL LAW.

1. The act of February, 26, 1874, entitled "An act to define the liability of railroad companies in certain cases," is not in conflict with any of the provisions of the constitution of the State. Missouri, etc., R. R. Co. *v.* Haley, 594.

2. This act was adopted by the Legislature of Kansas from the statute of Iowa, and the judicial construction given to the statute in that State follows it to this State; therefore, within the Iowa decisions, it embraces only those persons engaged in the hazardous business of railroading. The care or diligence the statute exacts towards the employee, is that degree of diligence which men in general exercise in respect to their own concerns, and contributory negligence of the injured employee bars a recovery under the statute, as in other cases. Id.

See BOND, 11, 28, 29, 43; EMINENT DOMAIN, 52; LAND GRANT, 1.

CONTRACT.

1. Before a party who is enjoying the fruits of a contract can avoid liability thereunder on the ground that it is against public policy, he must make it clearly manifest that this objection is well founded, and must also restore to the other party all that he received as a consideration for the promise which he seeks to avoid. Wiggins Ferry Co. *v.* Chicago, etc., R. R. Co., 1.

2. Where a village council and a railway company agree, under the statute, as to the terms upon which the company may use the streets of the village for its road, whereby the company bound itself to grade and gravel the streets so used, in a manner "to the acceptance of the council," *Held*, that a subsequent ordinance repealing the contract ordinance, passed with intent to rescind the entire contract, being inoperative, without the assent of the company, to rescind the grant of the right of way, is also inoperative to release the company from its obligation to grade and gravel streets. Cincinnati, etc., R. R. Co. *v.* Carthage, 306.

3. That upon the failure of such company within a reasonable time to grade and gravel the streets as per contract, a right of action accrues to the village without special notice, request or demand on the company to perform its contract. Id.

4. It is not essential to the right to maintain such action that the city should have established, by ordinance, other than the contract ordinance the permanent grade of such streets. Id.

5. Where such contract provides for the improvement of a dedicated street which had not been previously accepted by the council, such contract for its improvement constitutes an acceptance of the dedication on the part of the village. Id.

6. Under the statute the exclusive control of the streets is in the council of villages, and directions by the mayor, concerning their improvement, are wholly without authority. Id.

7. The measure of damages for the breach of such contract on the part of the company, is the reasonable cost of doing or completing the work, and upon such breach a right of action accrues for full damages, although the work has not been done or completed by the village. Id.

See BOND, 33; CORPORATION, 1-14; TAX, 19; WATER.

CONTRACTOR, 245.
See CORPORATION, 16.

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CORPORATION.

1. A ferry company entered into a contract with a railroad company, whereby it granted to the railroad company a site for a depot and right of way, and the railroad company, on its part, agreed to give to the ferry company the ferrying of all goods required to be transported between certain points. The contract contained a provision authorizing its assignment, and stipulating that all its covenants should be binding on the assignee. An assignment was subsequently made on the express condition that the assignee should take subject to all the covenants. The contract had been entered into in the first instance at the request of the assignee and with a view to the assignment. *Held*, that while the assignee might not be bound by the covenant in relation to ferrying as a covenant running with the land, yet he was bound by virtue of the other stipulations, and was liable for a breach of such covenant. Wiggins Ferry Co. *v.* Chicago, etc., R. R. Co., 1.

2. A railroad company has power to contract with another corporation to complete the transportation of goods whose destination is beyond the terminus of its own line. Id.

3. The ferry company having by its charter an exclusive right to ferry all freights passing either way between the city of St. Louis and the company's lands on the opposite (Illinois) shore of the Mississippi River, entered into a contract with the railroad company, by which the railroad company agreed that it would "always employ said ferry company to transport across said river all persons and property which may be taken across the said river either way to or from the Illinois shore, either for the purpose of being transported on said railroad, or having been brought to said river upon said railroad, ... so that said ferry company shall have the profits of the transportation of all such passengers and property taken across said river either way, by said railroad company, and that no other than said ferry company shall ever, at any time, be employed by said railroad company to cross any passengers or freights coming or going on said road." Another clause of the contract declared that the object of the ferry company in making the contract was to secure to itself "the ferrying business between the Illinois and the Missouri shores opposite the city of St. Louis, of all the freights and passengers carried or to be carried" by the railroad company. *Held*, that the railroad company, by this contract, bound itself to employ the ferry company to transport all the freight and passengers it might have crossing either way between said city and the Illinois shore at any point opposite, and not merely such as it might have crossing between the city and the ferry company's lands, and for this purpose it bound itself to bring all its freights and passengers to the said ferry. Id.

4. A railroad company requiring a ferry to complete the transportation of its freights and passengers at a terminal point, entered into a contract with a ferry company by which it bound itself to give all its ferrying business at that point to that company, and agreed not to employ any other. The ferry company, on its part, agreed to "furnish and maintain wharf and steam ferry boats sufficient to do with promptness and despatch all the ferrying of passengers and freight requiring it." *Held*, that this contract was not void as being against public policy, because it bound the ferry company to furnish all the facilities that the public interests required. Nor was it void as being in restraint of trade. Contracts are held void on this ground only when they operate a general restraint of trade. This contract was limited in its operation to a single place, and at that place did not wholly prohibit the ferrying business, but only limited it to one company. Id.

5. A railroad company and a ferry company entered into a contract for the ferrying of persons and property by which the ferry company bound itself to "furnish and maintain wharf and steam ferry boats sufficient to do with promptness and despatch all the ferrying of passengers and freight requiring it." At the time this contract was made all goods intended for transportation over this ferry were unloaded from the cars and placed on wagons. Subsequently a system of transferring loaded cars came into vogue. *Held*, that under this contract the railroad company had a right to demand of the ferry company that it adopt the new system. It was bound to adopt any improve-

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CORPORATION—*Continued.*
ments whereby transportation would be made cheaper, safer and more expeditious. Id.

6. A railroad company having entered into a contract with a ferry company for the ferrying of passengers and freights, afterward, with the fraudulent purpose of diverting traffic from the ferry and depriving the ferry company of the benefits of the contract, so arranged its business as to make it the interest of shippers to order their goods transferred by another ferry. *Held*, that under these circumstances the railroad company could not excuse its failure to deliver goods for ferrying according to the contract by showing that the shippers had ordered them sent by the other ferry. Id.

7. The plaintiff, a ferry company, entered into a contract with defendant, a railroad company, whereby it bound itself at all times to keep sufficient ferry boats and appliances to do all the railroad company's ferrying, and the railroad company, on its part, bound itself to give all its ferrying to that company. The ferry company was prepared at all times to comply with the contract, but the railroad company gave its ferrying to another company. In an action for breach of contract; *Held*, that the profits on all the business thus diverted were the true measure of damages. Id.

8. A railroad company, organized under the provisions of section 1820, Wisconsin, Rev. St., with power to purchase the franchises and property of an older company, previously sold under a mortgage, as well as to construct and operate other lines of road, is not, by virtue of such purchase, an assignee of the older company, so as to be bound by any of its contracts, except such as are a lien upon or otherwise bind the property and franchises thus purchased. Menosha *v.* Milwaukee, etc., R. R. Co., 300.

9. A railroad company, having power to extend its track from its depot in the plaintiff city through the city of Neenah, so as to connect with the Wisconsin Central Railroad, entered into an agreement with the city, for a valuable consideration, not to make such connection. *Held*, that this (if valid) was a mere personal contract, binding only said company and such persons as may be, in a strict sense, its successors or assignees. Id.

10. The Milwaukee & Northern R. R. Co., being authorized by legislative act to build a railroad from the city of Neenah, across Doty's island, to the line of the Milwaukee & Northern Ry. Co., in the plaintiff city, it takes authority by subdivision 6, § 1828, Rev. St., to operate such road in connection with the last-named company's road, notwithstanding any covenant of such last-named company with the plaintiff prohibiting such connection. Id.

11. No legal obligation of the Milwaukee & Northern R. R. Co. to refrain from building and operating said road being shown, the complaint alleges that the organization of said company was fraudulent and collusively made for the purpose of enabling its co-defendant, the Milwaukee & Northern Ry. Co., to avoid its covenant, etc., and asks for an injunction against both roads. The answer fully meets and denies all the averments of fraud and collusion. *Held*, that on the complaint and answer the injunction should have been refused, and plaintiffs left to their legal remedy. Id.

12. Railroad companies have an undoubted right to enter into a just and fair arrangement with a corporation or association whereby their business will be increased, although the effect of the arrangement may be to take business from others. With a view of increasing their business, they may extend more favorable terms to all shippers, although others engaged in the same business may be incidentally injured thereby. The fact that the public patronize those lines of transportation which give the most favorable terms constitutes no ground of complaint. Munhall *v.* Penna. R. R. Co., 338.

13. The Allegheny Valley R. R crosses the Pennsylvania R. R. at Allegheny Junction. To compete more successfully with the river transportation, the Allegheny Valley R. R. carried crude oil to the refineries at Pittsburg, and the manufactured product back to Allegheny Junction, at a uniform rate, thus giving to the refiner at Pittsburg as favorable terms as if located at Allegheny Junction, and thereby securing a uniform rate on oil from the oil regions to the seaboard. *Held*, that to deny the right to make such an arrangement would be an

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CORPORATION—*Continued.*
unwarranted interference with the management of the business of the railroad, and deprive the public of the benefit of the competition to which it is justly entitled. Id.

14. The right of connecting railroads to make contracts for through rates is incident to their powers unless prohibited by their charter. Where such contracts are not unjust, unconscionable, or in restraint of trade, they will not be interfered with. Id.

15. Township aid bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had put up and agreed to convey, but did not do so. *Held*, on a bill for an accounting, that he should be charged with the bonds. Michigan, etc., R. R. Co. *v.* Mellen, 245.

16. Where several persons either as co-partners or joint contractors had done work under an agreement wtth a railroad company, a payment made to one of them in township aid bonds binds the rest if with full knowledge of the facts they decline to repudiate the payment and make a distinct claim upon the company. Id.

17. It is a fraud upon the rights of a railway corporation if a director who buys lands for the use and benefit of the company and pays for them with its funds, takes the title in his own name or jointly with others; and the nominal grantees would hold in trust for the company. Id.

See STREET RAILWAY TAX.

CORPORATION, MAY BE INDICTED FOR MAINTENANCE OF A PUBLIC NUISANCE, 318.

COUNTY BOND.

See BOND.

CREDITOR.

See DEBTOR AND CREDITOR.

CROSSING, DEFECTIVE, 305.

See HIGHWAY, 1.

CULVERT.

See WATER.

DAMAGES, 1, 48, 248.
See CORPORATION, 7; EMINENT DOMAIN; PLEADING AND PRACTICE, 8; WATER, 5, 6.

DEBTOR AND CREDITOR.

1. Creditors who have received bonds in payment cannot retain them and question their validity or value at the same time; if they wish for a payment in cash they must give up the bonds. Michigan, etc., R. R. Co. *v.* Mellen, 246.

2. A creditor cannot keep money paid to him to satisfy any claim but that on which it was actually paid, unless his debtor consents. Id.

3. A debtor when making a payment has the right to direct its application, and the creditor cannot refuse to apply it accordingly and credit it on some other account. Id.

DEED.

The mere acceptance of a deed by one in occupation of land does not estop the grantee from questioning the title conveyed by that deed, or from suing on the covenants for failure of title, and this, notwithstanding such grantee had, at the time of receiving the deed, himself a pre-emption right to the land. Such acceptance is not of itself proof of the settlement and compromise of a controversy. Kansas, etc., R. R. Co. *v.* Dunmeyer, 417.

See BOND; EMINENT DOMAIN, 68.

DEFINITION.

A "right of way," in its legal and generally accepted meaning in reference to a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase. Williams *v.* Western, etc., R. R. Co., 290.

See BOND, 44; HIGHWAY, 1; TAX, 7.

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DIRECTOR.

See CORPORATION.

DITCH.

See WATER.

DRAINAGE.

See WATER.

ELECTION, 189.

See BOND, 1-3.

EMBANKMENT.

See WATER.

EMINENT DOMAIN.

1. A railroad company organized under the Illinois general law of March 1, 1872, has authority to select its own route, to lay out its road and to construct the same; and this power, by necessary implication, carries with it the power of fixing the terminal points of the proposed road, subject only to the limitation that the construction of its road upon or across any street in any city must be with the assent of the corporation of such city. Chicago, etc., R. R. Co. v. Dunbar.

2. A railroad company, as a general rule, may select its own route, fix its terminal points, and lay out its road and acquire the right of way and other property necessary for the construction of its road on any and every part of its line, whether within city limits or without them, according to its own discretion. The lines selected may, without the assent of the city, cross streets, and the company may, without such assent, acquire the right of way and construct its road on every part of such line, except the parts to be constructed upon or across streets. Id.

3. Under the present legislation, it is not necessary, as a condition precedent to the location of its line within a city by a railroad company, or to the construction of its railroad within the city, or such parts of its lines as are not within any street, or to the power to condemn any private property within the city for such purpose, that any ordinance should be passed by the city council either giving assent for the construction of the road upon or across streets, or providing for the location of the road. Id.

4. A city ordinance granting permission to a railroad company to construct and operate a railroad within the city limits, is not void because it fails to designate the precise line upon which the road may be constructed, and omits to designate the precise points at which the road may be constructed across and upon the several streets to be intersected by it. Id.

5. Permission granted by a city council to a railroad company to construct its road across streets at any points to be selected by the company within a given district, is not a delegation to the company of powers which can only be exercised by the council, as the power to locate the line of the road is given by statute to the railroad company alone, and not to the city authorities. The city of Chicago has power to make provision for the location of a railroad within its limits, but no power to locate. That power is in the railroad company, subject to such provisions for the location as the city council may make. Id.

6. The mere existence of a power in a city council "to provide for the location, grade and crossings" of railroads within the city, and "to change the location, grade and crossings" of railroads, until exercised, is no limitation, upon the power of a railroad company to select its route and locate its road within the city. Id.

7. The clause in the city act that "the city council shall have no power to grant the use of or the right to lay down any railroad tracks in any street" of the city, "except upon petitions of the owners of the lands representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes," has reference only to cases where the city may propose to grant the privilege to a railroad company to run along a street for a given distance, and not to a case where the road merely crosses a street. Id.

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EMINENT DOMAIN—*Continued*

8. A provision in a city ordinance that the permission to construct a railroad within the city is upon condition that the railroad company shall permit any other railroad companies, not exceeding two in number, which have not then the right of entrance into the city, to use the main track of the road therein authorized to be laid, jointly with such road so authorized, does not render the ordinance invalid, as it confers upon the railroad company no power not given it by law, nor does it deprive the city of any power whatever. Id.

9. The law authorizing the condemnation of private property for railroad purposes, is limited to such property as is necessary for the purpose in question, and no condemnation proceedings can lawfully be had of property not necessary for the construction or use of the road. But this necessity need not be made certain before it is lawful to proceed with the condemnation. Id.

10. The provision of the general Railroad Act of 1849, prohibiting railroads from entering cities without municipal consent, if not repealed by implication by the act of 1872, is wholly so by the act of March 31, 1874. Id.

11. The charter of a city gave it no authority to grant permission to a company to put down a street railway in its streets. A general statute of the State gave to all the cities power to grant such permission. Eichels *v.* Evansville St. Ry. Co. 274.

12. *Held*, that such city derived power from such general statute to grant permission to a company to lay its tracks in the street. Id.

13. Where the abutting lot owners own the fee in the street, subject to the public uses, the laying of a street railway, when the cars are propelled by horses, is not an additional burden on the easement. Id.

14. A railroad company seeking the condemnation of a part of a lot for the purposes of the road, has no cause to complain of an order of court fixing the compensation to be paid, and directing the money to be paid to the treasurer of the county for the benefit of the owners of the property affected, or those interested in it. Such an order does not determine who is entitled to the compensation awarded. Chicago, etc., R. R. Co. *v.* Prussing, 289.

15. Defendant procured to be condemned, for the use of its railroad, a strip of land through the south half of a certain block, 58, 4¼ rods wide, of which two rods in width were west of the centre of its track. Afterwards it obtained a deed, from one F., of "a strip of land six rods in width, for the uses and purposes of said railroad company, along the line of their road as at present [then] located [through the south half of said block], and also all the land in the south half of said block situated west of the route of said road." Afterwards it deeded to one E. "all of that portion of block 58 which lies west of and beyond the western boundary of the right of way of said company's railroad as the same is located and established." *Held*,

(1) That the eastern line of the land granted to E. is a line two rods west of the centre of defendant's tract, i.e., the west boundary of the land condemned for its use.

(2) That there is an incurable uncertainty in the description of the strip six rods wide conveyed to defendant by F. Williams *v.* Western, etc., R. R. Co., 290.

16. In a proceeding upon appeal to recover damages for the right of way appropriated to the use of a railroad company, the owner of the land filed a petition setting forth his claim, but made therein no reference to the construction of any crossings or bridges, and no sufficient evidence was offered showing any necessity for the land-owner to build a bridge for a farm-crossing. *Held*, That a finding of $85 for a bridge, as an element of damage, not sustainable. Atcheson, etc., R. R. Co. *v.* Lyon, 295.

17. In assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams being frightened, or that additional care by the land-owner may be necessary in the future as to such teams, by reason of the proximity of the railroad, does not of itself constitute any basis for special compensation. Such damages are speculative, and not the proper subject of inquiry and damage. Id.

18. In an action for trespass to real estate, by which permanent injury to it is

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EMINENT DOMAIN—*Continued*
done, if the property have a rental value the depreciation in the annual rental value caused by the injury may be shown, in order to show how much the value of the real estate was diminished by the trespass. The trespass consisted in constructing a railroad across a farm without the right to do so having been acquired by ascertaining and paying compensation to the owner. *Held*, that if the ties and rails increased the value of the farm, that should be considered in determining the amount of damages; but if the farm was no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage done to the farm should be made on account of the value of the ties and rails. Schroeder *v.* First Div. St. P. and P. R. R. Co., 298.

19. The provision in section 16 of the Ohio corporation act of May 1, 1852, which requires a railway company to place a highway crossed or diverted, "in such condition as not to impair its former usefulness," is a condition inseparable from the right or franchise granted to such company to cross the highway with its railroad, or to divert it from its location. State *v.* Dayton, etc., R. R. Co., 312.

20. While the company continues in the exercise of the franchise, the State has the right to compel it to perform the condition upon which the franchise was granted, by petition invoking the equity powers of the court, prosecuted by the attorney-general, in the name of the State. Id.

21. In enjoining the railway company from using the highway, where it has been diverted by the company from its location, but left in such close proximity to the railway as to make it dangerous for public travel, it is proper for the court to prescribe what change in the location shall operate to supersede the injunction. Id.

22. On allowing an injunction against the company from any further work on or obstruction of the highway, the court may, on final hearing, require the removal of the obstructions already placed thereon, in case the company refuse to restore such highway to its former usefulness.

23. The remedy given to the county commissioners by the act of March 7, 1878 (70 Ohio L. 53), for the obstruction of a State or county road is cumulative and does not affect the right of the State to maintain the present action. Id.

24. A turnpike is a public highway, in so far that an indictment will lie against one obstructing it, as for a public nuisance. Northern, etc., R. R. Co. *v.* Commonwealth, 318.

25. A railroad company may construct its railway across any established road or way wherever it may be necessary to cross or intersect it, but it must so construct it that it will not impede the passage or transportation of persons or property over said road or way. If it so construct its railway as to be a serious inconvenience and dangerous obstruction to travel along the road or way, it may be indicted therefor. Id.

26. The fact that the Act of Assembly, incorporating a turnpike company gives it a specific remedy for an injury to its rights, does not impair the separate right of the Commonwealth to indict. Id.

27. Where the fee of a street is in a municipal corporation, and such corporation grants a railroad company the right to construct its track and operate its road thereon, such company is not liable to an abutting lot-owner for consequential damages unless they result from the negligent or improper construction of the road. O'Connor *v.* St. Louis, etc., R. R. Co., 324.

28. Where lots abutting on a street are injured by reason of the improper construction of a railroad through the street, the true measure of damages is the difference in the rental value of such lots with road as constructed, and the rental value had it been properly constructed. Id.

29. The Panhandle and Junction railroads crossed Moore's land, side by side, in a straight line, nearly east and west, on a right of way 100 feet wide, which they had bought and paid for; these roads went between Moore's house on the north and his barn on the south; within 100 feet of each of these buildings the right of way extends; a lane led into the public highway, which lane ran north and south, between the house on the west and the barn on the east; and the right of way of the two railroads crossed this lane between the house on the north and the barn on the south. The ground appropriated for its main line by the Union

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EMINENT DOMAIN—*Continued.*

R. R. Transfer and Stock Yard Co. was a strip seventy-five feet wide along all the east line of Moore's land; the house and barn stood nearly midway between the east and west line of his land and 700 feet west of such appropriation, which ran nearly north and south, crossing the Panhandle and Junction roads at nearly right angles. The switch began at the main line 700 feet south of the Panhandle and Junction roads and crossed Moore's land, crossing north-westwardly, and joins the right of way of the other two roads fifty feet east of the lane. The court, among other things, instructed the jury that "the condition of the Junction and Panhandle roads at the date of appropriation can only be considered in estimating the value of the ingress and egress upon the east of Moore's land to and from the residue not appropriated by the Belt (Union R. R. Transfer and Stock Yard) road." *Held*, error. Union, etc., R. R. Co. *v.* Moore, 346.

30. Proof at what other land than that appropriated, but in the same neighborhood, could be bought for is inadmissible. Id.

31. Where improper evidence is admitted the presumption, on appeal, is that it misled the jury; and such error is sufficient to reverse the case unless the contrary clearly appears. Id.

32. Proof was held admissible to show that the effect of the Union R. R. Transfer and Stock Yard Co. crossing the other two railroads was to cause the cars of the last two roads to blockade Moore's ingress and egress to his property. Id.

33. An allegation in a petition by a railway company to condemn land for a right of way, that the petitioner "has not been able to acquire the title nor the right of way over the land, by purchase or by voluntary grant from" the defendants, though not formal, is substantially sufficient under the statute, as showing an inability to agree as to the compensation to be paid. Booker *v.* Venice, etc., R. R. Co., 357.

34. A judgment condemning a strip of land one hundred and twenty feet wide for a right of way for a railway will not be reversed because the land condemned exceeds one hundred feet in width, where it does not appear from the record that the additional twenty feet was not necessary, by the pleadings, and no such objection was raised before the court below, either by demurrer or reasons assigned in arrest of judgment. The objection not being made below must be considered as waived. Id.

35. In a proceeding to condemn land for a right of way, the jury allowed a lessee of the land taken, whose lease had three years to run, the amount of rent he was to pay per acre for the whole term, as to the land condemned, while he contended that for gardening purpose it might yield much more. There was no proof that it would be used for such purpose, and no other damages shown, and it appeared that the lessee had the option of terminating the lease at any time; *Held*, that the verdict would not be set aside as against the evidence, and that future profits of the land taken were too uncertain to be depended upon as a measure of damages. Id.

36. In a proceeding by a railroad company to condemn an entire lot in a city for the use of its road, evidence of the price per foot an adjoining tract had been sold for, and the price per foot at which other lots had been offered for sale, is doubtless competent if offered by the company as evidence in chief, but is not after the defendant has closed. Chicago, etc., R. R. Co. *v.* Maroney, 360.

37. In a proceeding to condemn land, where the petitioner closes his case and the land-owner gives evidence of the value of the property sought to be taken, there is no error in refusing to allow the petitioner to prove the price at which an adjoining tract was sold, or at which other lots in the vicinity are offered for sale. Such evidence is in chief and not in rebuttal, and it is a matter of discretion to open the case and let in proof which ought to have been given in chief. Id.

38. On an appeal from an assessment of damages done to a farm by reason of the appropriation of a right of way through it for a railroad, it is competent for a witness, who is a farmer, and well acquainted with the market value of the land in the vicinity, to testify to the value of the farm before and after the location of the railroad. Kansas, etc., R. R. Co. *v.* Allen, 362.

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EMINENT DOMAIN—*Continued.*

39. Where land is condemned for railroad purposes the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken; and where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that; but injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered. Fremont, etc., R. R. Co. *v.* Whalen, 364.

40. Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken. Id.

41. Witnesses should not be permitted to express their opinions before the jury of the value of the land, subject to the right of way. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the opinion of others. Id.

42. Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed. Fremont, etc., R. R. Co. *v.* Lamb, 367.

43. When requested by the owner of land crossed by the road of the company, the latter are required to make and keep in good repair an adequate means of crossing the track. Id.

44. Where a railroad company obstructs an alley in a city, by building a railroad track through the alley, so as afterwards to make the alley useless as an alley, an abutting lot owner has the right, if he chooses, to consider the obstruction as a permanent taking and appropriation of the alley by the railroad company, and may commence an action against the railroad company and recover damages for such obstruction, and in such case, the measure of his damages will be the injury to his lot at the time the alley was taken and appropriated by the railroad company, and not at the time of the trial of the case. Central Br., etc., R. R. Co. *v.* Andrews, 370.

45. Proceedings to condemn lands for railway purposes, though subject to judicial review and supervision, are not judicial proceedings and do not involve a contest on litigious rights; they are special proceedings by a temporary tribunal selected for the occasion. Toledo, etc., R. R. Co. *v.* Dunlop, 378.

46. In Michigan the inquiry, in proceedings to condemn lands for railroads, is as to an appraisal or estimate of values and a determination of the necessity of the proposed taking for public purposes. Id.

47. If, in proceedings to condemn lands, a jury has been summoned under proper circumstances, has conducted its inquiries legally and with due regard to private rights, and has reached a legitimate conclusion as to the necessity for the condemnation and the compensation, the appropriation of the land, on payment of such compensation, will be lawful and will not be affected by collateral action by the judge or court. Id.

48. A judge cannot, by ex parte action, interfere in a proceeding which is not a suit in court, with regular legal proceedings pending in the ordinary course of justice, where the parties interested have no notice beforehand, nor any regular means of relief. Id.

49. The owner of lands sought for the use of a railway company cannot be compelled to determine, at his peril, whether a jury will regard the land as necessary for public use; he cannot, therefore, be in fault for refusing a tender for it when he can have no assurance that the proposed improvement will be sanctioned. Id.

50. The statute for condemning lands for railway purposes is fatally defective in not providing a means or tribunal for determining the question of tender, which cannot be done by the judge or a jury. Id.

51. The owner of lands sought by a railway company in condemnation proceedings is not deprived of any rights by the mere deposit, pending appeal, of the sum awarded by the jury, as there is no statute requiring him to take the risk of such a deposit, or depriving him of any rights until he is paid. Id.

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EMINENT DOMAIN—*Continued.*

52. An act entitled, "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," is not unconstitutional, on the ground that the title provides for more than one object, its object being to bring together the legislation concerning the creation and management of railroads. Id.

53. The power of a railroad company to begin proceedings for the condemnation of lands within the State, is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same State as the original company. Id.

54. Where a railway company seeking to condemn lands does not obtain authority from the owner in fee, it can obtain no rights of control over the land by any license or grant from the holder of a contingent dower interest or a tenant at will. Id.

55. A railway track or other improvement wrongfully placed upon land by a railway company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty for the purpose of increasing its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company. Id.

56. A judge or circuit court commissioner "attending" a jury in proceedings to condemn lands forms no part of the special tribunal, and his functions are at most advisory. Under the Constitution of Michigan as well as at the common law such a jury are judges of both law and fact, and where their proceedings are not based on false principles, an appellate court will not consider questions raised on merely technical objections to the admission or rejection of testimony by them, though in accordance with the magistrate's rulings. Id.

57. The jury, in proceedings to condemn lands are not bound by the testimony submitted to them, but are also expected to use their own judgment and knowledge from a view of the premises and from their own experience as freeholders. Id.

58. The findings of a jury in proceedings for the condemnation of lands will not be set aside unless upon objections raised to the record, and unless the record shows that the proceedings were erroneous. Id.

59. Where proceedings to condemn lands were affirmed so far as the findings of the jury were concerned, but beyond that were reversed, costs of the Supreme Court and of the proceedings below were allowed to the appellants. Id.

60. The Atchison, Topeka and Santa Fe R. R. Co. having completed the line of road authorized by its charter, and having once condemned land in the city of Atchison for depots, side-tracks, etc., and needed more room in said city for the transaction of its business, instituted proceedings for condemning more land. *Held*, that such proceedings could be maintained, and that under the statute the right of eminent domain was not terminated by the completion of the road or exhausted by a single exercise of the power. Central Br., etc., R. R. Co., 389.

61. Notwithstanding the fact that the Atchison, Topeka and Santa Fe R. R. Co. was organized under a special charter of the Territorial Legislature it has a right to proceed for the condemnation of lands in accordance with the provisions of the general statutes in respect thereto. Id.

62. Where the owner of a tract of land conveys the same to a railroad company by which only a portion thereof is used, and the said owner remains in possession of the residue, farming and improving the same, such possession will be deemed to be by permission of the company and not adverse to it. Hence it cannot be made available by a grantee of said owner in order to set up a title under the statute of limitations. Jeffersonville, etc., R. R. Co. *v.* Oyler, 397.

63. A. being the owner of a tract of land conveyed the same to a railroad company by a deed which was not recorded. The company used but a portion of said land for their track and A. remained in possession of the residue, farming and improving the same. Subsequently A. conveyed the portion of the land cultivated by him to B., who had no notice either express or constructive of the former conveyance, and who paid value therefor. *Held*, that B.'s title was good as against that of the railroad company. Id.

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EMINENT DOMAIN—*Continued.*

64. Where, in proceedings for the condemnation of lands, the award of compensation is made jointly, to the owner, and a mortgage of the land taken, it will be presumed to have been made on proper notice to both parties, and the owner may appeal from the assessment of damages without the mortgagee being a party to such appeal. Lance *v.* Chicago, etc., R. R. Co., 617.

65. Where, in condemnation proceedings, it appeared that at the time the railroad entered upon the right of way there were crops growing thereon, which were destroyed by the construction of the road, *held*, that it was competent to show their value as an element of damages. The measure of compensation for the right of way in such cases is the difference in value of the land immediately before and the value after the right of way is taken, excluding the benefits of the road to the farm. Id.

66. In proceedings for the condemnation of land for a railroad, a right of way was taken along the edge of a grove of trees, which stood between the house and other buildings and the railroad, and, upon the trial of an appeal from the award, witnesses were allowed to testify that, owing to the proximity of the track, there was danger of the fire from the engines running through the dry leaves, and destroying the grove and buildings, and also to testify as to the value of the grove and dwelling-house. *Held*, that the admission of such evidence was error. Id.

See CORPORATION; DEFINITION; HIGHWAY; LAND GRANT; PLEADING AND PRACTICE, 7, 8; RIPARIAN RIGHTS; STREET RAILWAY, 1; WATER.

ENTRY OF LAND.

See LAND GRANT.

ESTOPPEL, 220.

See BOND, 41, 42; LAND GRANT, 5.

FARM CROSSING, 295.

See EMINENT DOMAIN, 16, 17.

FERRY, 1.

See CORPORATION, 1–7.

FRESHET.

See WATER.

GRANTEE, NOT ESTOPPEL FROM QUESTIONING TITLE, 417.

See LAND GRANT, 5.

HIGHWAY.

A road that has never been regularly laid out or opened by the proper authorities, and which is in fact unused and is unfit for travel and closed against the public, is not a "highway" within the meaning of the provision of the railroad law which makes a company laying track across public highways liable for injuries resulting from neglect to restore them to a proper condition, even though the owners of land along the road had moved their fences back so as to open it as a highway and had been paid for their lands by the township and a bridge had been built upon it by the public authorities. Flint, etc., R. R. Co. *v.* Willey, 305.

See EMINENT DOMAIN, 19–26.

HOMESTEAD, ENTRY OF, 408, 412.

See LAND GRANT, 2, 4.

ILLEGAL ISSUE OF BONDS, 150.

See BOND, 7, 8.

ILLINOIS STATUTE, 158, 170, 191, 253.

See BOND, 11, 24, 29; EMINENT DOMAIN, 1, 10; TAX, 7.

INDIANA STATUTE, 165, 274.

See BOND, 17; BOND, 11.

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INJUNCTION, 28, 312, 327.
See BOND, 46; EMINENT DOMAIN, 21, 22; STREET RAILWAY, 1.

————, WHEN TO BE DENIED IN PLEADINGS, 11.

INTEREST, PAYMENT OF A WAIVER OF IRREGULARITIES IN ISSUE OF BONDS, 170.
See BOND, 27.

JURY.
See EMINENT DOMAIN.

KANSAS STATUTE, 181, 594.
See BOND, 28; CONSTITUTIONAL LAW, 1, 2.

LAND GRANT.

1. The Northern Pacific R. R. Co. was incorporated and endowed with a grant of lands by an act of Congress, approved July 2, 1864. *Held*, that upon full compliance with the terms of the grant, so far as certain lands in this State are concerned, the company became entitled to a complete, perfect, and absolute title to the same, and to receive the proper evidence of such title from the United States; that thereupon the lands ceased to belong to the United States, and became subject to the tax laws of this State, and that the company having contracted to sell the same, they were properly taxable under such laws. *Held*, further, that the provision of the act of Congress, passed in 1870, requiring the company, as a condition precedent to its right to patents for such lands, to pay the cost of surveying, selecting, and conveying the same, was an attempt to attach a new condition, not found in the original grant, to the company's right to the lands, and to the evidence of the title to the same which Congress had no power to impose, as its effect would be to deprive the company of property rights. Co. of Cass, etc., *v.* Certain Lands, 404.

2. The act of Congress of July 21, 1866, granting certain lands to the State of Kansas to aid in the construction of the Northern Kansas R. R., construed to be a grant in præsenti, and to vest the right of way in the railroad from the date of the passage of the act, and not merely from the date of the location of the road, and that subsequent settlers on the land granted took subject to this right of way. St. Joseph, etc., R. R. Co. *v.* Baldwin, 408.

3. Semble that where Congress has conferred on a railroad of a State a right of way over the public lands in a Territory, the State subsequently created out of that Territory cannot prevent the enjoyment of the right previously conferred on the corporation. Id.

4. The plaintiff was a beneficiary of the grant made by the act of Congress of March 3d, 1863, granting lands to the State of Kansas to aid in the construction of certain railroads. The line of its road was definitely located and fixed in and through the county of Rice on December 10th, 1870; but no order was made by the Secretary of the Interior withdrawing lands along such line from sale and the operation of the homestead and pre-emption laws, until February 13th, 1871. *Held*, that the title passed on December 10th, 1870, and that a settlement by defendant on a tract of land within the limits of the grant, made between December 10th, 1870, and February 13th, 1871, gave to the latter no right to homestead or pre-empt the land. Atchison, etc., R. R. Co. *v.* Bobb. 412.

5. July 25, 1866, M. made a homestead entry of a tract of land. On July 11, 1866, the railroad company, one of the companies named in the act of Congress of July 2, 1862, filed its map, showing the general line of its road. On July 14, the commissioner of the general land office wrote to the local land officers, advising them of the filing of this map, and directing the withdrawal of the lands along the line of the road, in accordance with the provisions of the act of Congress of July 3, 1866. This letter was received July 26, 1866, and the same day the entries were made of the withdrawal. The land upon which M. had filed was in an odd-numbered section within the limits of this withdrawal. Afterward, the road was built, and on December 17, 1869, M. purchased from the railroad company, and took a certificate of purchase, which after one or two

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LAND GRANT—*Continued.*

assignments passed into the hands of the plaintiff, and was by him surrendered to the company, and a deed taken. April 28, 1871, M.'s homestead entry was cancelled; but in October, 1871, D. made a new homestead entry. A contest was had before the land officers between D. and the railroad company, which was decided by the commissioner of the land office in favor of D. The company not appealing, the decision was made final, and a patent issued to D. *Held*, that the title conveyed by the patent to D. was paramount to any title passed to the company by its land grant. Kansas, etc., R. R. Co. *v.* Dunmeyer, 417.

6. A homestead entry made before the definite location of the railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not cancelled until after the location, did not operate to except the land from the grant to the railroad company under the provisions of the act of Congress of March 3, 1863, donating to the State of Kansas lands to aid in the construction of certain railroads and telegraphs.

The land in controversy—a part of an odd-numbered section, and within the ten-mile grant of land to the A., T. and S. F. R. R. Co., by virtue of the act of Congress of March 3, 1863—was in 1863 public land open to homestead settlement; in October, 1863, one R. homesteaded it; in 1868 he voluntarily abandoned it; in June, 1869, the line of the railroad of the A., T. and S. F. R. R. Co. was definitely located opposite to this land. At the time of such definite location the land was abandoned, but the entry or filing of R.'s homestead was uncancelled; on November 3, 1869, a withdrawal of lands was made under the act of March 3d, 1863, within the limits of which withdrawal the land is situate; in May, 1874, the land was certified to the State of Kansas, and in February, 1875, patented by the State of Kansas to the railroad company; in October, 1871, one S. had R.'s entry cancelled, and then homesteaded the land himself. S.'s entry was, on the application of the railroad company, afterward cancelled, but on August 14, 1878, reinstated by the Secretary of the Interior, under the provisions of the act of Congress of April 21, 1876, and on April 2, 1879, a patent was issued to S. *Held*, That the title to the land vested in the railroad company in June, 1869; that the entry of S. was erroneously reinstated; that the title of the railroad company to the land could not be disturbed by an act of Congress subsequent to June, 1869; and that the decision of the land department awarding the land to S. in 1878, by a mistake of law, is not conclusive. Emslie *v.* Young, 422.

7. A certain piece of land in Chase County, Kansas, was on March 3, 1863, and subsequently (except for the facts hereafter stated), a part of the public lands of the United States, and was a part of the lands granted by the acts of March 3, 1863 (12 U. S. Stat. at Large, p. 772), and July 26, 1866 (14 U. S. Stat. at Large, p. 289). It was situated within ten miles of the line of the road of the Atchison, Topeka and Santa Fé R. R. Co., one of the beneficiaries of the first grant, and within twenty miles, but not within ten miles, of the line of the road of the Missouri, Kansas and Texas Ry. Co., the beneficiary of the other grant. On December 3, 1866, the line of the M., K. and T. Ry. Co. was definitely located, while the line of the A., T. and S. F. R. R. Co. was not definitely located until March 8, 1869. But the land was never selected by or for the M., K. and T. Ry. Co.; but, on the contrary, the M., K. and T. Ry. Co. united with the A., T. and S. F. R. R. Co. in asking that the Secretary of the Interior should certify the land to the State of Kansas for the benefit of the A., T. and S. F. R. R. Co., which the Secretary afterward did. *Held*, that the M., K. and T. Ry. Co. never obtained any interest in this specific piece of land; that although said grants were in præsenti, yet they did not attach to any specific piece of land until the line of the road of the beneficiary railroad company was definitely located; and not then to the indemnity lands, which were situated more than ten miles and less than twenty miles from the railroad, but only to such lands when they were selected for such beneficiary at the instance and under the supervision of the Secretary of the Interior. Atchison, etc., R. R. Co. *v.* Rockwood, 434.

8. On April 3, 1867, the Secretary of the Interior, in accordance with said act of July 26, 1866, and for the benefit of said M., K. and T. Ry. Co., withdrew

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from market a large amount of land, including the specific piece of land now in controversy. *Held*, that this withdrawal did not of itself and alone affect any right or interest of the A., T. and S. F. R. R. Co. in and to any lands within its grant. The withdrawal was simply intended to prevent persons who had no interest in the lands, or no interest prior to that of the Missouri, Kansas and Texas Ry. Co., from acquiring any such interest, and not to prevent persons who did have some interest in the lands prior to that of the Missouri, Kansas and Texas Ry. Co. (as the Atchison, Topeka and Santa Fé R. R. Co. had) from perfecting such interest. And further, *held*, that this withdrawal did not prevent the A., T. and S. F. R. R. Co. from definitely locating its road and taking title to all lands situated within ten miles of its road, and coming within the terms of its grant. Id.

9. After both of said grants had been made, after the lines of both of said railroads had been definitely located, after the lands, including this specific piece of land, had been twice withdrawn from market, from sale and pre-emption, once being withdrawn in favor of the M., K. and T. Ry. Co., and once—to wit, on November 3, 1869—being withdrawn in favor of the A., T. and S. F. R. R. Co., R. then—to wit, on June 22, 1871—settled upon the land as a pre-emptor. Afterward both the A., T. and S. F. R. R. Co. and R. perfected their titles and obtained patents for the land; the A., T. and S. F. R. R. Co. from the State of Kansas, and R. from the United States. *Held*, that the title of the A., T. and S. F. R. R. Co. is paramount to that of R., and R. being in possession of the land, the railroad company is entitled to recover the same from him. Id.

10. Under the act of Congress of July 26th, 1866, granting lands to the State of Kansas to aid in the construction of the southern branch of the Union Pacific railway and telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas, when the line of the railroad was definitely located, the title of the railway company to the odd sections within the ten-mile limit became, ipso facto, fixed and absolute. With respect to the land in the indemnity territory, commonly called "lier lands," the right of the company was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed by the act. Missouri, etc., R. R. Co. *v.* Noyes, 440.

11. Where N., having the qualifications therefor, made a homestead entry for eighty acres of public land, and within the indemnity territory, from which the deficiency in the ten-mile limit was to be supplied to the railway company, under the act of July 26, 1866, prior to any withdrawal of the lands from market or entry, and before such tract had been selected to help satisfy any deficiency, and afterward, and while N. was in possession of the land under such entry, and after he had complied with all the provisions of the homestead act, the Secretary of the Interior selected the tract to supply a deficiency in the odd section of land in the ten-mile limit, and the railway company, upon such selection, obtained a patent from the United States; therefore, *held*, that the selection and the issuance of the patent were without authority of the statute, as N. had, under his homestead entry and compliance with the provisions of the homestead law, the paramount right to the land. Id.

12. Under the act of Congress of May 15, 1856, granting to a State, for the purpose of building a railroad, certain lands within fifteen miles of the then intended location, and the amendatory act of June 2, 1864, extending the limit to twenty miles, the land being then granted by the State to the railroad: *Held*, that a vested title to the lands passed by such act, which was not forfeited by a subsequent change of location of the road authorized by act of Congress; and that even if such change of location worked a forfeiture, the title remained in the road until proceedings by the parties to which the forfeiture accrued divested it, and such forfeiture cannot be asserted as a defence by a disseizor, but is a question entirely between the parties to the grant. Grinnell *v.* Chicago, etc., R. R. Co., 447.

LAND, PURCHASE OF, 125.

See TAX, 19.

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LEVEE, 48.

See WATER, 1-8.

MANDAMUS, 208.

See BOND, 40; PLEADING AND PRACTICE, 6.

MASTER AND SERVANT.

1. A brakeman was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. It appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant, or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to. Painton *v.* Northern, etc., R. R. Co., 456.

2. There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury. Id.

3. The plaintiff before and at the time of receiving the injury complained of (from the falling of a bank of earth under which he was excavating gravel for defendant), was fully informed of the peril to himself of the services in which he was engaged, and voluntarily remained in the dangerous position which he was occupying. *Held*, there was no error in rendering a judgment of nonsuit. Naylor *v.* Chicago, etc., R. R. Co., 460.

4. The mere fact that in a railroad company's private yard, where cars are loaded and unloaded, and trains made up, such cars are permitted to move along the tracks unattended by a brakeman, cannot be held negligence as matter of law as against the company's servants employed in such yard. Kelley *v.* Chicago, etc., R. R. Co., 469.

5. When a master employs a servant to do a particular kind of work with particular kind of instruments and machinery, the master does not agree that they are free from danger in their use, but that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant in the use of such machinery, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service. Lake Shore, etc., R. R. Co. *v.* McCormick, 474.

6. Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but, if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for injuries which may occur to them in the use of such implements or machinery. Id.

7. In an action by a brakeman for an injury received while engaged in coupling cars, by his foot being caught in a dangerously-constructed frog at a switch on the line of the road, the jury found specially that the switches and frogs of the road were in the same condition during all the time the plaintiff was in the employ of the defendant, and that they were of the same kind as those used on

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the principal railroads in the country; that plaintiff had full opportunity to acquire a knowledge of the condition of all the switches and frogs in the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that while walking on the track behind a moving car, his foot was caught in one of the frogs; that the printed rules of the company forbid brakemen to go between the cars in motion to couple them, and forbid coupling by hand in all cases where a stick could be used; that, in consideration of employment by defendant, the plaintiff agreed to obey said rules; that, under the circumstances, the plaintiff used proper care to avoid injury to himself. *Held*, that the defendant was not liable. Id.

8. Where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the person injured had been frequently in charge of the same car, and in the habit of using the same ladder, there was no error in directing a nonsuit. Ballou *v.* Chicago, etc., R. R. Co., 480.

9. One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. Id.

10. The master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against; but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty. Pittsburg, etc., R. R. Co. *v.* Sentmeyer, 508.

11. Where an employer has furnished his employees with tools and appliances, which, though not the best possible to be obtained, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents. Id.

12. The fact that one employee upon a railroad is hired and discharged by one superior agent and another by another does not affect the relation of the employees to each other as fellow-servants. Slater *v.* Jewett, 515.

13. A company or individual operating a railroad has the right, as regards employees, to vary from the regular time-table in the running of trains; all that is required is due care and diligence in giving notice of the change and in running the train upon the changed time. Id.

14. It is not required that the master should see to it personally that notice of such a change comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent persons to receive and transmit the necessary orders, negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. The duty of the master is performed when he provides beforehand and makes known to his servants rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one entitled to it. Id.

15. Where regulations for the running of trains out of time, proper and suitable, with a view to the safety of employees, are prescribed, obedience to these regulations by those having charge of a train is matter of executive detail; for a disobedience of them, which causes injury to a co-employee, the master is not liable. Id.

16. It seems that the courts may take judicial notice of the way in which the great railways are managed in the every-day practical running of them, i.e., by overlooking officers at distant places, who by means of a telegraph are advised where trains are, and direct their movements. Id.

17. S., plaintiffs' intestate, was a fireman upon a train running upon a railroad operated by defendant as receiver. He was killed by a collision between his train and another. It was the custom, and was prescribed by the general regulations for the running of trains on said road, that when trains were behind time they should be moved in accordance with special telegraphic orders from

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MASTER AND SERVANT—*Continued.*
the train despatcher, to be communicated by the telegraph operators receiving them to the conductor and engineer of the train, in the presence of each other. An order was so sent directing where the train which collided with the train upon which S. was should meet the latter. The operator communicated it to the conductor, but not to the engineer; the conductor, without the authority or assent of the engineer, signed the name of the latter in acknowledgment of receipt of the order, and the train despatcher was advised that the order had been correctly delivered. The conductor forgot to deliver the order to the engineer, who, in ignorance of it, instead of waiting at the station designated until the other train came up, proceeded with his train and the collision occurred. In an action to recover damages there was no evidence but that the operator and conductor were competent and skilful when employed. It did appear that defendant's rules and regulations were well devised for safety, and had been in use for a number of years without occasioning any accident. *Held*, that the negligence was that of fellow-servants of the intestate in the same common employment, for which defendant was not liable. Id.

18. Where an action is brought against a railroad company by one of its employees to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company as to the management of a particular train, which order was unreasonable and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in producing the injury, affords no defence to the action. Pittsburg, etc., R. R. Co. *v.* Henderson, 529.

19. An engineer and brakeman are fellow-servants, engaged in a common service. A railroad company is not responsible to a brakeman for an injury occasioned by the negligence of the engineer. Pittsburg, etc., R. R. Co. *v.* Ranney, 533.

20. If a railway company is not guilty of negligence in the selection of an engineer, it is not liable to his fellow-servant for injuries resulting to such fellow-servant from the want of proper care on the part of the engineer. Houston, etc., R. R. Co. *v.* Willie, 541.

21. A foreman was put in charge of a set of hands, whose business it was to repair freight cars while standing on the track, in the yard of the company in which trains were accustomed to be made up; it was also the duty of the foreman to participate with the hands in doing the work. While the foreman and a hand were engaged in repairing a car, and the latter was at work under the car by the order of the foreman, he was injured by the striking of the car on which he was working by another car moving on the same track. *Held*, that the hand was the subordinate of the foreman, in respect to the work in which he was engaged at the time he was injured. Lake Shore, etc., R. R. Co. *v.* Lavalley, 549.

22. That it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him, while thus engaged, from the danger arising from the switching of cars and the making up of trains on the same track; and for an injury resulting from the want of such care the company is liable. Id.

23. While the railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, engaged in the same general undertaking, it is liable, in such case, where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury. Ohio, etc., R. R. Co. *v.* Callarn, 555.

24. Where the engineer of a locomotive places it in the hands of a fireman incompetent to manage it, contrary to the rules of the railroad company in whose employ he is, he is guilty of negligence. Id.

25. A railroad company is guilty of negligence in permitting its order, forbidding firemen to handle its engines, to be violated by its engineers, and retaining them in its employ, after notice of their practice of abandoning their engines to the fireman, which practice led to the placing of an engine in the hands of

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MASTER AND SERVANT—*Continued.*

a careless and incompetent fireman, whereby injury to the co-employee occurred. Id.

26. Notice to the master mechanic of such company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company. Id.

27. McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yard master L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signalled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yard master was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable. McCosker *v.* L. I. R. R. Co., 564.

28. Plaintiff was employed as a shoveller upon a construction train, and while going to the rear end of the train in discharge of his duty was, by reason of the uncoupling of the caboose by the conductor, and a sudden jerk of the train caused by the engineer, thrown from the car and run over by the caboose. *Held*, that the evidence was sufficient to sustain the verdict of the jury to the effect that the injury was caused by the proximate neglect of conductor and engineer, and that plaintiff was not guilty of contributory negligence. Jeffrey *v.* Keokuk, etc., R. R. Co., 568.

29. Plaintiff, while going as a shoveller of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow bank from the track by means of the snow-plough alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business, which he assumed, and that the conductor and others, whose negligence is alleged, were fellow-servants in the same employment. Howland *v.* Milwaukee, etc., R. R. Co., 578.

30. A servant of a railroad company employed in repairing the track thereof, and one employed in running trains thereon, are engaged in the same general undertaking; and where the former is injured by the negligence of the latter the company is not liable therefor. Gormley *v.* Ohio, etc., R. R. Co., 581.

31. A railroad company is liable for injuries suffered in this State by one of its agents or servants from negligence of any other agent or servant thereof, without contributory negligence on his part (section 1816, Rev. St.), and in case of his death from such injury the action may be brought by his personal representative. Crumz *v.* Chicago, etc., R. R. Co., 583.

32. Where there are two or more lines of action, any one of which may be taken, and such an agent, with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterward ascertained by the result that his choice was not the best means of escape is not sufficient to charge him with negligence. Id.

33. The plaintiff was in the employment of the Union Trust Company, then operating and controlling the Missouri, Kansas and Texas Ry., as a trackman, whose principal duty consisted in repairing the track of the railway. To facilitate the work, the trackmen, or "section gang," were furnished by the company with a hand-car, operated by the men of the "gang," which enabled them to rapidly transport themselves and their tools from one portion of the track to another. A place was appointed at station S., in which, when not in use, the hand-car and tools were kept; and at the close of the day's labor on the track, it was the duty of the men to transport the hand-car and tools to this station, and there properly dispose of them until required the next day. On April 30, 1878, the plaintiff at the close of his work on the track, was ordered by his

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MASTER AND SERVANT—*Continued.*
foreman to put his tools on the hand-car, and to get on himself, which order he obeyed—the employees occupying three hand-cars and the plaintiff riding upon the middle car. On the way to the station the rear car was propelled so fast by the men upon it that it, by the culpable negligence of the men operating it, was thrown against the middle car, which could not escape, in consequence of the nearness of the forward car, and thereby the middle car was thrown from the track, and the plaintiff seriously hurt. *Held*, the plaintiff was injured while in the line of his duty, and that he was within the provisions of the act of February 26, 1874, defining the liability of railroad companies in certain cases. (Comp. Laws 1879, p. 784, § 4914.) And further, *held*, that he was entitled to recover for all damages received by him in consequence of the culpable negligence or mismanagement of his co-employees. Union Trust Co. *v.* Thomason, 589.

34. A person employed upon a construction train to carry water for the men working with the train and to gather up tools and put them in the caboose or tool car, is within the statute making railroad companies liable to their employees for injuries resulting from the negligence of co-employees. Missouri, etc., R. R. Co., *v.* Haley, 594.

35. Where such an employee upon a construction train, consisting of an engine, two cabooses and four or five flat cars, with the engine coupled on to the caboose, with the flat cars in the rear, all slowly backing at the rate of about four miles an hour, is directed by the conductor in charge of the train to pick up a crowbar lying crosswise near the rear end of the rear flat car, and while in the act of stooping to pick up the bar, falls off and is killed by being run over by the cars, and the fall is caused by a sudden concussion or jerk of the cars from reversing the engine by the engineer to stop the train, on account of cattle near to the track at the rear of the train, and neither the statute, the rules of the company, nor the custom on the trains, requires any preliminary signal or warning to the laborers upon the train to enable them to hold fast, or otherwise secure themselves to the cars, before reversing the engine or stopping the cars under such circumstances; *held*, that upon these facts the engineer was not guilty of culpable negligence in failing to ring the bell or sound the whistle, or giving other signal before reversing the engine; and further *held*, that the accident, if not directly contributed to by the want of care of the employee falling from the car, may be denominated entirely a fortuitous one, for which the railroad company is not liable. Id.

36. Negligence is not to be presumed, but must be proven; and where the evidence in an action for damages against a railroad company, under the statute of February 26, 1874, shows that all the co-employees exercised toward the injured employee that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances, no liability is established against the company. Id.

37. Where the defendant's neglect consisted in the erection and maintenance of a dangerous structure obvious to the senses long before the accident, *held*, that he was not liable, whether the structure could have been differently built or not. Rains *v.* St. Louis, etc., R. R. Co., 610.

38. To constitute a servant of a railroad company the vice-principal, so as to hold the company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard. Id.

39. If a brakeman knows that a foot bridge over the railroad upon which he is employed is too low to permit a man standing erect on the top of a freight car to pass under it in safety, and, nevertheless, remains in the service of the company, and while passing under the bridge on the top of a freight car stands erect and is killed by coming in contact with the bridge, the company is not liable. Id.

40. Where the plaintiff, an employee of a railroad company, was injured while uncoupling the cars of the company through an alleged negligence of the engineer, and there was some doubt whether plaintiff's employment required him to

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MASTER AND SERVANT—*Continued.*
perform this service, the jury may decide that it was in the line of his employment. Ferguson *v.* Central, etc., R. R. Co., 614.
41. If a particular manner of uncoupling cars while in motion was a customary way of doing the work, and was negligent and wrong, the plaintiff himself for the time being in command of the movements of the train, he is himself in part responsible for the injury, and should not be heard to complain. Id.
42. In an action by a brakeman for injuries sustained while getting off the train in the discharge of his duties, the injury resulting from his coming in contact with a cattle chute that projected to within from 19 to 23 inches from the passing car, witnesses were allowed to testify that it was in the line of duty for a brakeman to get off the car when it was in motion, and also how and when he should get off, when called upon to turn a switch. *Held*, that the admission of such evidence was erroneous. Allen *v.* Burlington, etc., R. R. Co., 620.
43. Evidence was admitted, on behalf of the plaintiff in such action, to the effect that a man could not, with safety, ride by this chute holding to the side of the car, as plaintiff had been doing. *Held*, that evidence offered by defendant to show that persons had frequently ridden upon cars as broad as the one on which the injury occurred, between the chute and the outside of the car, when the chute was the same as at the time of the accident, should have been received. Id.
44. A railroad company has no legal right to construct cattle chutes in such close proximity to its track as to endanger the safety of employees operating its trains, although by so doing it may be better enabled to load and unload live stock. Id.

See PLEADING AND PRACTICE, 12–18, 23, 24, 32, 34; NEGLIGENCE, SUNDAY.

MICHIGAN STATUTE, 378.
See EMINENT DOMAIN, 50, 52.

MISSOURI STATUTE, 139.
See BOND, 4, 5.

MORTGAGE, 114.
See TAX, 12, 14.

MUNICIPAL BOND.
See BOND.

NECESSITY, WORK OF, 40.
See SUNDAY, 1, 2.

NEGLIGENCE.
1. Plaintiff alleged that there was a hole in the platform connected with defendant's depot, of a dangerous character, and that the same was known to defendant, but that defendant had wilfully failed and refused to repair the same, and that while plaintiff was lawfully engaged about his business on said platform he had fallen down said hole, injuring himself, wherefore he claimed damages. Defendant answered that plaintiff had full knowledge of the hole, and, with his eyes wide open, in broad daylight, had walked into it, wherefore he was guilty of contributory negligence which precluded recovery. To this plaintiff replied, denying that he was guilty of contributory negligence. *Held*, that the reply, though it failed to deny the substantive facts alleged in the answer, was nevertheless good, inasmuch as the allegations of the answer only disclosed a state of things which might or might not amount to contributory negligence on the plaintiff's part. Louisville, etc., R. R. Co. *v.* Wolfe, 625.
2. Where, in an action to recover damages for injuries done to the plaintiff's horses and wagon at a crossing on the defendant's road, the complaint substantially set out that the plaintiff before attempting to drive over the crossing stopped, looked and listened, but by reason of a deep cut on the defendant's line and intervening underbrush was unable to see an approaching train, and then upon endeavoring to drive over said crossing, which was slightly higher than the rest of the highway so as to impede the vehicle, was run down and driven over

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NEGLIGENCE—*Continued.*
by an engine on defendant's road, which came through the cut above mentioned at a reckless rate of speed, viz., fifty miles an hour, giving no signal and making no sound to alarm the plaintiff, in consequence of which he was injured without any negligence on his part by the negligence of the company defendant:

Held, that said complaint did not contain anything from which contributory negligence on the part of the plaintiff could be inferred, and that it was therefore not demurrable on that ground. Pittsburg, etc., R. R. Co. *v.* Wright, 628.

3. The averment in the complaint that plaintiff was without fault was a merely formal one, and admitted of any legitimate proof by which its truth could be established. Id.

4. It is for the court by proper instructions to define negligence with reference to the facts of the case, and for the jury to say whether there was negligence. Id.

5. Statements made by the driver of the vehicle injured in the above case about half an hour after the accident, *held* inadmissible as part of the res gestæ. Id.

6. Where said driver had been called as a witness on the trial, but was not asked as to said statements, evidence of what they were is inadmissible in order to impeach his testimony. Id.

7. Where the assignments of error embrace a refusal to permit a witness to answer a specified question, and the bill of exceptions discloses the fact that the real question asked was aliter than that set forth in the assignments, the court will not reverse, though the evidence was improperly rejected. Id.

8. In an action for occasioning the death of the plaintiff's intestate the complaint stated that the company defendant had constructed a culvert under its track at a point where said track crossed one of the streets of a city, and that it had left a portion of said culvert uncovered, so as to be dangerous to persons travelling on said street; that plaintiff's intestate while walking along said street, exercising due and reasonable care, fell into said culvert without fault or negligence on his part, receiving injuries from which he died; wherefore plaintiff claimed damages.

Held, that although it was fairly inferable from the allegations of the complaint that the deceased knew of the dangerous place into which he fell, yet that this only obliged him to use care and caution proportioned to the danger which he knew to be in his way; and that, therefore, from the facts, no irresistible presumption of contributory negligence arose which rendered the complaint demurrable. Toledo, etc., R. R. Co. *v.* Branagan, 630.

9. It is well settled that "one who is injured by the mere negligence of another cannot recover, at law or equity, any compensation for the injury if he, by his own or his agents' ordinary negligence, or wilful wrong, contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." Little Rock, etc., R. R. Co. *v.* Parkhurst, 635.

See HIGHWAY; PLEADING AND PRACTICE, 37, 38.

NEW YORK STATUTE, 150, 199.
See BOND, 9, 34.

NUISANCE, 318.
See EMINENT DOMAIN, 24–26.

OHIO STATUTE, 298.
See EMINENT DOMAIN, 19, 23.

OVERFLOW OF WATER.
See WATER.

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PATENT, TITLE BY.

See LAND GRANT.

PERSONAL PROPERTY, WHAT IS? 102.

See TAX, 7.

PLEADING AND PRACTICE.

1. The report of a referee is equivalent to a special verdict, and if there is evidence tending to establish the facts as found, it will not be disturbed on appeal as being against the weight of evidence. Wiggins Ferry Co. *v.* Chicago, etc., R. R. Co., 1.

2. Where no bill of exceptions or certificate of evidence is found in the record of a chancery case, the propriety of the decree must be determined exclusively from the allegations of the bill, and the facts found by the court as stated in the decree, as it must be presumed the evidence was sufficient to sustain such findings. A court of review, where nothing appears to the contrary, will indulge in all all reasonable presumptions to sustain the decree of the lower court. Binkert *v.* Wabash, etc., R. R. Co., 113.

3. If a decree specially finds to be true every material fact in the bill, and contains no findings at all modifying the effect of the facts thus found, it will follow that if the facts charged in the bill are sufficient to sustain the decree, then the decree is not erroneous. Id.

4. The jurisdiction of quasi judicial officers to make a decision in any case is always open to inquiry, and the decision may be attacked collaterally for want of jurisdiction. Cogwin *v.* Hancock, 150.

5. If an allegation of a pleading is one that the pleader can be heard to make, and it be well pleaded, then a demurrer admits it to be true, otherwise it does not. Goddard *v.* Stockman, 164.

6. A writ of mandamus can compel a public officer to do only what the law has made it his duty to do, and cannot issue to one officer to compel another to do his duty. Rowland ex parte, 208.

7. A court of equity will not take jurisdiction to restrain the laying of a railroad side-track by a company in the public street in front of its own property to connect with the main track of a railway, under license by the city council, by ordinance, on a bill by private individuals owning property in the vicinity but not abutting on the part of the street to be used. Truesdale *v.* Peoria G. S. Co., 248.

8. Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street, must be sought in an action at law. Id.

9. A writing coming from the proper custody, and which is more than thirty years old, proves itself, and may be admitted in evidence without proof of the handwriting of the person executing it. A fortiori, should it be admitted where there is such proof. Jeffersonville, etc., R. R. Co. *v.* Oyler, 397.

10. Objections to the admission of evidence based on slips in pleading which might have been corrected by amendment in the court below will on error be disregarded. The record will be viewed as though the amendment had been made. Id.

11. When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit. Painton *v.* Northern, etc., R. R. Co., 454.

12. Whatever is the real ground of complaint ought to be distinctly stated in the petition. Hence, in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. Edens *v.* Hannibal, etc., R. R. Co., 459.

13. An engine on which plaintiff was fireman was derailed and overturned, he was "severely burned, maimed and permanently injured, and has suffered and continues to suffer great pain in body and mind, and that by reason thereof he became, and for a long time remained, ill, and is still suffering from said in-

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PLEADING AND PRACTICE—*Continued.*

juries." There was no motion to make the complaint more definite or certain. *Held*, that there was no error in admitting evidence for plaintiff that the covering of his spinal cord was injured by the accident, and that urinal difficulties resulted from his injuries; nor in admitting evidence that an inguinal hernia made its appearance about nine months after the injury, and was the result thereof. Delie *v.* Chicago, etc., R. R. Co., 464.

14. The fact that plaintiff failed to make adequate proof of the last averment, so that the court withdrew that subject from the consideration of the jury, has no bearing on the question of the admissibility of the evidence in the first instance. Id.

15. A verdict for $1700 damages in this case not showing that the jury were actuated by passion or prejudice, this court refuses to set it aside as excessive. Id.

16. In an action for injuries from negligence, where the specific acts constituting such negligence are averred in the complaint, it must be presumed here, in the absence of anything in the record to the contrary, that the evidence of negligence was confined to those acts, even where there is a general verdict for the plaintiff. Kelley *v.* Chicago, etc., R. R. Co., 469.

17. Where a special verdict was demanded and ordered, it will not be presumed here that the jury were also directed to find a general verdict. Id.

18. After answering all the questions propounded for a special verdict, the jury added that they found "for the plaintiff to the amount of $2000." In the absence of any proof in the record that the court directed a general verdict, this is construed as simply a finding of plaintiff's damages in case he was entitled to recover upon the facts of the special verdict. Id.

19. Where the special finding of the facts is inconsistent with the general verdict, the former will control the latter, and the court must give judgment accordingly. Lake Shore, etc., R. R. Co. *v.* McCormick, 474.

20. Where the superintendent of a railroad company has made an order as to the management of a particular train, which order will be reasonable or unreasonable according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable is a question of mixed law and fact, to be determined by the jury under proper instructions. Pittsburg, etc., R. R. Co. *v.* Henderson, 529.

21. In a suit against a railway corporation, service of process was made in August, 1874, under the provisions of the act of February 7, 1854 (Pasch. Texas, Dig., art. 4888), "by leaving with the within-named defendant, the H. and T. C. R. R. Co., at their chief office in Houston," a true copy of the citation and the accompanying certified copy of plaintiff's petition. On the proposition that a motion to quash the service should have prevailed, *Held*—

1. The second section of the act of March 21, 1874, entitled "An act to fix the venue in certain cases," and the second section of the act of April 17, 1874, entitled "An act to confer jurisdiction in certain cases," did not repeal by implication the provisions of art. 4888, Pasch. Dig., but were intended to be cumulative.

2. The motion to quash was properly overruled. Houston, etc., R. R. Co. *v.* Willie, 541.

22. In a suit for damages for personal injuries, brought by a brakeman against a railway, in which the unskilfulness and incompetency of the engineer were charged as causes of the injury, the court admitted in evidence the declarations of the engineer to the plaintiff, to the effect that he would as soon run over him as not. *Held*—

1. The evidence was admissible, as a circumstance showing the want of care on the part of the company in the selection of him as its engineer, but it should have been so restricted by appropriate instructions to the jury.

2. The personal malice indicated by the declaration, if the cause of the injury, would not render the company liable for actual damages thus inflicted on a fellow-servant, and the jury should have been so instructed. Id.

23. In a suit for damages by an employee of a railway company for injuries sustained, which permanently disabled him, the jury were instructed that, if

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PLEADING AND PRACTICE—*Continued.*
they found for plaintiff, to find no greater sum than a sum which, put at interest, would produce annually a sum equal to the difference between what plaintiff could earn before his injury, and what his ability would be restricted to earning, in consequence of the injury. *Held*, error. Id.
24. In an action brought by an employee of a railroad company against it, to recover for injury sustained while in the discharge of his duty, the negligence charged was, the moving of a car under which the plaintiff was working, without notice or warning. The proof showed that the negligence in not giving notice or warning of the moving of the car was attributable to the foreman under whose control the plaintiff was working and not to those engaged in moving the car.
Held, that the case was not one of a failure of proof under section 188 of the Ohio Code, but, at most, of variance under sections 191 and 192. Lake Shore, etc., R. R. Co. *v.* Lavalley, 549.
25. A complaint against a railroad company for damages to the person of an employee, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its employees, is sufficient on demurrer; and proof may be given thereunder of any acts or circumstances of negligence, on the part of such defendant in the running of the locomotive causing the injury. Ohio, etc., R. R. Co. *v.* Collarn, 555.
26. Uncertainty in the allegation of negligence in such complaint is a defect that cannot be reached by demurrer, but by motion to make specific. Id.
27. On a demurrer to the evidence, the court is bound to take as true all the facts which the evidence tended to prove, and such inferences from them as the jury could fairly have drawn, though the jury might not have drawn them. Id.
28. Generally, where the facts of a case are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury, and this is true in that class of cases where the existence of such facts comes in question, rather than where deductions or inferences are to be made from them; but if, from the facts proven, different minds may draw different conclusions, the case may be properly left with the jury. Id.
29. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal loss and injuries, and unless the damages are such as to induce the belief that the jury must have acted from prejudice, partiality or corruption, their verdict ought not to be disturbed. Id.
30. If one of two paragraphs of complaint is good, the Supreme Court will presume, on appeal, that the court below, on overruling a demurrer, to the evidence, applied the evidence to the good paragraph, and not to the bad paragraph. Id.
31. A complaint for injuries sustained by the plaintiff through the fault or negligence of another is bad if it does not aver that the plaintiff was without fault or negligence contributing to the injury complained of. Gormley *v.* Ohio, etc., R. R. Co., 581.
32. Where, in an action by a servant against the master for injuries resulting from the negligence of co-servants, the petition stated that the injury occurred in a particular way, *held*, that a request to charge that, to entitle plaintiff to recover, they should be satisfied that the injury occurred in the manner stated in the petition, should have been given. Manuel *v.* Chicago, etc., R. R. Co., 588.
33. Where instructions asked were properly refused, and those given by the court seem to fairly embody the law applicable to the case, judgment in favor of the plaintiff, against the instructions and rulings of the court, will be reversed. Ferguson *v.* Central, etc., R. R. Co., 614.
34. Defendant requested the court to charge that it could not have been required to use ordinary care, or held to responsibility for a failure to do so, unless it failed to use such care after being aware of plaintiff's danger. *Held*, that, inasmuch as the defendant had, by its negligence in refusing to repair the hole, rendered it impossible for it or its agents to become aware of plaintiff's peril in time to avoid the injury done him, the refusal of the court to charge as above did not constitute error. Louisville, etc., R. R. Co. *v.* Wolfe, 635.

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PLEADING AND PRACTICE—*Continued.*

35. In such case the court is right in instructing the jury that their verdict must be confined strictly to compensatory damages. Id.

36. Where an instruction is given to the jury at the request of a party to a cause, and he makes no objection and takes no exception to it, the court will not at his instance pass upon the correctness of said instruction on error. Id.

37. Where one claims damages for injuries caused by the negligence of another no presumption arises that he is himself free from fault. In order to recover he must show due care on his own part. Where the circumstances point just as much to the negligence of the plaintiff as to its absence, or point in neither direction, he cannot recover. Toledo, etc., R. R. Co. *v.* Branagan, 630.

38. On the trial of the cause, the complaint in which is set forth above, the evidence showed that the deceased came home at night in great pain from an injury on the side and soon after expired. His wife took a pair of his shoes and found that they fitted impressions of feet in the soft mud of the culvert just under the opening. A woman passing near the culvert shortly before deceased came home heard a cry of pain which sounded as though it came from the culvert. The medical experts examined testified that the death of plaintiff's intestate might have been occasioned by a fall such as plaintiff claimed to have taken place. There was no other evidence as to how the accident occurred. *Held*, that the evidence failed to disclose the fact that the deceased had exercised due care and prudence, and that, therefore, plaintiff was not entitled to recover. Id.

See BOND, 14, 33, 37, 38, 46; CORPORATION, 11; EMINENT DOMAIN, 20, 26, 30—35, 66; MASTER AND SERVANT, 8, 9, 28, 36, 40; NEGLIGENCE, 1, 8; STREET RAILWAY, 1; TAX, 13, 16, 20.

PRE-EMPTION OF LAND, 408, 412.

See LAND GRANT, 2, 4.

PUBLIC POLICY, AVOIDANCE OF CONTRACT AS AGAINST, 1.

See CONTRACT, 1.

REFEREE, 1.

See PLEADING AND PRACTICE, 1.

RIGHT OF WAY, 102, 290.

See TAX DEFINITION.

RIPARIAN RIGHTS.

The second section of the act of the General Assembly of Iowa, entitled "An Act in relation to riparian owners on the Mississippi and Missouri rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at its outer end beyond low-water mark erected, without the direction or consent of the Secretary of War, a stone pier or crib, this court affirms the judgment of the Supreme Court of that State, declaring that under that section a railway company cannot construct its road over the embankment between high and low-water mark, unless the damages to such owner shall first be ascertained and paid. Railway Co. *v.* Renwick, 90.

See WATER.

ROLLING STOCK, WHAT IS? 102.

See TAX, 7.

RUNNING STREAM.

See WATER.

SEAL, FAILURE TO AFFIX, 205.

See BOND, 39.

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STATUTE.

See BOND, 4, 5, 9, 11, 17, 24, 25, 28, 29, 34; CONSTITUTIONAL LAW, 1, 2; CORPORATION, 10; EMINENT DOMAIN, 1, 10, 11, 19, 23, 50, 52; LAND GRANT, 1–8, 10–12; PLEADING AND PRACTICE, 21.

——— **OF LIMITATION**, 48, 397.

See EMINENT DOMAIN, 62; WATER, 2, 7.

STOCK.

See BOND; TAX, 7.

STREAM, RUNNING.

See WATER.

STREET, LAYING TRACK IN, 248, 253.

See PLEADING AND PRACTICE, 7, 8; EMINENT DOMAIN, 3–8, 11–13.

——— **PAVING OF.**

See CONTRACT.

STREET RAILROADS.

The plaintiff, a street railroad corporation, obtained from the city council of Cleveland the right to construct and operate its road through certain streets of the city, upon certain terms and conditions expressed, and subject to such other terms and conditions as the council might thereafter prescribe. Among the conditions expressed, it was stipulated that a certain other railroad company, then in existence, should be allowed to run its cars upon a portion of the plaintiff's road, upon the payment of such reasonable compensation as the council should prescribe, if the parties were unable to agree. Afterward, another company was organized, to which was granted the right of way along certain streets, and also upon a portion of the route already occupied by the plaintiff, and upon its track, upon the payment to the plaintiff of a reasonable compensation. These companies failing to agree upon the amount to be paid, the council prescribed a certain sum, which was tendered, but refused by the plaintiff. Thereupon, the plaintiff brought suit against said other last-mentioned company to enjoin said company from using any portion of its track, alleging, among other things, that the compensation so prescribed and tendered was inadequate, which allegation was negatived by defendant. *Held*,

That the plaintiff did not acquire an exclusive right to use the route upon which its road was constructed.

That the property of the plaintiff in its tract was subject to be taken for a like public use in common, upon compensation being first made.

That the council stipulated for the right, in such case, to prescribe a reasonable compensation.

That, without proof that the amount of compensation so prescribed and tendered was inadequate, the plaintiff is not entitled to an injunction. Kinsman St. R. R. Co. *v.* Broadway, etc., R. R. Co., 327.

SUBSCRIPTION FOR BONDS.

See BOND.

——— **FOR STOCK.**

See BOND.

SUNDAY.

1. The defendants were indicted for having been engaged at common labor on Sunday. The evidence showed that they were servants of a railroad company, and were engaged, on that day, in taking up an old switch and putting in a new one, and that the work could not be accomplished in less time than eight hours; that the work could not have been done on any day of the week except Sunday without delaying four of company's trains; that the track of the company was then in a very bad condition, and it was then engaged in taking up the old iron and replacing it with steel. *Held*, the work was one of necessity within the meaning of the statute. Yonoski *v.* State, 40.

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SUNDAY—*Continued.*

2. By the word "necessity" is meant, not a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of each particular case. Id.

See BOND, 1.

SURFACE WATER.

See WATER.

SURVEY, COST OF, 404.

See LAND GRANT,

TAX.

1. Under section 1, art. 9, of the Illinois Constitution, an assessment for taxation must be made by the person or persons to be elected or appointed in the manner the General Assembly shall direct, and not otherwise. Therefore, an assessment made by a person or persons not authorized by law is void, and no judgment can be rendered for the taxes levied on such assessment. Chicago, etc., R. R. Co. *v.* Dennison, 94.

2. Under the Revenue law, the exclusive power to assess railroad track and rolling stock of railway companies is conferred upon the State Board of Equalization, and therefore an assessment of property used as a railroad track, by the local township assessor, is void. Id.

3. Land held and in actual use by a railroad company for side tracks, switches and turnouts must be regarded, within the meaning of the Revenue law, as a part of the right of way of the company, notwithstanding it may have machine shops, depots, round-houses, and other superstructures thereon, necessary for the successful use of the road. Id.

4. In this case, two lots of a railway company contained about 32 acres after deducting a strip 100 feet wide running through them occupied as the main track. The 32 acres were covered by tracks, used all the time for the purpose of running cars and engines over them, and for switching cars, making up trains, loading and unloading cars, and for various other purposes in the transaction of the company's business. It was also used for car-shops, machine-shops, blacksmith-shops, foundry, round-houses, freight-depot, stock-yards, paint-shops, etc. *Held*, that the whole of the lots constituted a part of the company's right of way, and its railroad track, and as such could not legally be assessed by the local township assessors. But land cannot be regarded as right of way merely because one or even two side-tracks may be constructed upon it. The land must be, in fact, appropriated for the purpose of the right of way. Id.

5. When a corporation is formed under Illinois laws by the consolidation of other corporations, one of which was incorporated under the laws of the State, and the others in other States, the new, or consolidated company, is to be considered as "incorporated under the laws of this State," within the meaning of the last clause of the first section of the Revenue Act of March, 30, 1872, and the capital stock of such corporation in this State is subject to taxation here. Ohio, etc., R. R. Co. *v.* Weber, 101.

6. The State Board of Equalization found the value of the capital stock and rolling stock of a railroad corporation, operating its road and franchise in this and other States by a continuous line, by taking the value of the entire capital stock, and all the rolling stock of the corporation everywhere, and set apart so much of the entire value of each, for taxation in this State, as the proportion of the length of its main line, in this State, bore to the length of the entire line of the road owned and operated by it. It did not appear whether this was done from their own knowledge, or from information from other sources, and there was nothing to show fraud or illegality in their action. *Held*, in the absence of proof to the contrary, that the mode adopted by them, and the conclusion they reached, was fair and reasonable, and that this was not an assessment of any part of its property in the other States. Id.

7. Under the statute, the property of railroad companies is thus classified and defined for the purposes of taxation: The "capital stock" means all the property and rights of the corporation, of every kind and nature, wherever located.

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TAX—*Continued.*

The "railroad track" embraces property held for right of way, including superstructures thereon, and this is declared to be real estate. "Rolling stock" embraces the movable property of the corporation, which is declared personal property, and this is such property as, in its ordinary use, is taken from one part of the line to another, as cars, locomotives and their attachments, and usual accompaniments. "Personal property, other than rolling stock," embraces tools, materials for repairs, and all other property which, in its ordinary use, is not taken from one part of the line to another, and the local property, the railroad track, and rolling stock, constitute the tangible property of the corporation, and all other kinds of property, embracing the franchise and such other values as are inaccessible to the local assessors, the intangible property, and all those combined constitute the capital stock. Id.

8. The object of the legislature, in regard to the assessment of railroad corporations, was and is to subject each railroad company in the State to taxation, in proportion to the value of all its property liable to be taxed, whether tangible or intangible, real, personal or mixed, embracing, among other kinds of property, the franchises granted or exercised within this State. Id.

9. A rule adopted by the State Board of Equalization, for the Assessment of the capital stock of corporations, that the value of all shares of the stock, and the value of all the debts, excluding those for current expenses, should be added together to ascertain the fair cash value of the capital stock, or entire property, including the franchises, and that from this sum should be deducted the amount of the value of all tangible property, and that the remainder should be taken as the fair cash value, to be assessed for taxation, was sustained on an application to enjoin the collection of a tax levied upon such sum, when equalized, by the board, with other property. Id.

10. While it is true that the statute must be understood as applying only to such property of railroad corporations, operating in this and other States, on the same line of road, as is subject to taxation in this State, the fact that the value of the whole property, both in and without the State, is used in the computation by which to arrive at the value of that part thereof to be assessed here for taxation, will not render the assessment or the taxes levied thereon invalid. Id.

11. A railroad tax will not be enjoined because the distribution of its taxable property, other than its local property, among the several counties through which its road runs, was made by the clerk of the Board of Equalization after the adjournment of the board, when it is made on the basis as fixed by the statute, and the burden on the railway company has not been increased by the appointment. This is but a ministerial act resting in computation, and does not require the exercise of any discretion. Wilson *v.* Weber, 112.

12. Where the decree, upon a bill to enjoin the levy of a collector's warrant upon personal property of the complainant, issued upon an assessment of the same against a former owner, finds that the mortgage under which the complainant claims was a valid lien on the property prior to the assessment, and delivery of the warrants to the collector, this will amount to a finding that the mortgage was properly acknowledged and recorded, or that possession must have been taken under it before it expired, the presumption being in favor of the finding of the cuort. Binkert *v.* Wabash, etc., R. R. Co., 118.

13. A bill to enjoin the sale of complainant's personal property for taxes levied against a former owner, made the collectors of several counties defendants, among whom was the collector of Scott county, who, by mistake, was named as Coats. There being no service on him, an amendment was made to the bill in which the name of the collector of that county was correctly given, who appeared and answered, and the cause proceeded to final decree, without question as to the regularity of the proceedings. It was objected that the decree being joint, if erroneous as to any one defendant, must be reversed as to all. But the court did not regard that the decree was against Coats, it being intended to be against the collectors only, but held, that whether it was rendered against him or not, it could not, in the slightest manner, prejudice the other defendants. Id.

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TAX—*Continued.*

14. A copy of a mortgage, and a stipulation of the parties that it might be used in evidence the same as the original, transcribed into the record, but neither of which is in any manner verified, is insufficient, and does not make them a part of the record; and even if they were considered, the stipulation would not make the mortgage evidence or show it was offered in evidence and considered. Id.

15. The findings of a decree in reference to a matter about which there is no allegation whatever, cannot be sustained; but this rule does not apply to cases where the facts found by the decree have been defectively stated in the bill. Therefore, a statement in a bill, of the making of a chattel mortgage will fully warrant the court in finding it was a valid lien, in the absence of objection to the sufficiency of the allegation. Id.

16. A recital in a decree of foreclosure, finding the mortgage to be a prior valid lien, does not render the degree erroneous, as finding a mere conclusion of law. The validity of a mortgage is frequently a mixed question of law and fact, and depending upon the existence or non-existence of other facts and circumstances. Id.

17. The statute makes a lien for the taxes assessed upon personal property only from and after the tax-books are delivered to the collector, and this lien has no reference to the property originally assessed, but it attaches to all the personal property of the tax-debtor. Therefore, if the person assessed on any article of personal property, executes a valid mortgage upon the same, or makes a valid sale thereof, before the tax-books are received by the collector, the person holding under such mortgage or sale will hold the property free from any lien on the same for the taxes, and a levy upon and sale of the same for the taxes will be enjoined. Id.

18. The statute makes taxes assessed upon real property a lien thereon from and including the first day of May in the year they are levied until the same are paid. The tax on each tract is kept separate and distinct from the taxes on every other tract, and such a tax becomes a debt, not only against the owner, which may be recovered in a personal action, but also a charge upon that particular tract of land and no other tract. Id.

19. S. entered into a contract in writing, in 1868, with a railroad company, to purchase certain real estate, and covenanted to pay all taxes which should be lawfully imposed on the premises. Under the contract, he went into possession of the land, paid a small portion of the purchase money, and made valuable improvements. He defaulted as to the payment of taxes for the years 1873, 1874, 1875, and 1876. In May, 1877, there was a settlement between S. and the company, and S. relinquished all his right in the land and all his improvements to the company; the company accepted the surrender of his written contract, and released all its claims against him under the covenants thereof. *Held*, That S. was thereby relieved of all duty or obligation to pay past or future taxes on the premises; and after such settlement S. was not debarred from acquiring a valid tax title to the premises, on account of his former relation with the railroad company, under the contract of purchase. Shoup v. Central Br. U. P. R. R. Co., 125.

20. The omission of the official title of the assessor after his signature to the oath to his official return of the valuation of real estate, and the absence of the official seal of the county clerk on the jurats to the oath of the assessor attached to such return, and upon the affidavits of the publication of the tax levy and tax sale, are mere irregularities, and will not invalidate the tax proceedings based thereon. Id.

21. The omission of the name of the person to whom a tract of land is assessed, from the notice of the tax sale, and from the notice of the expiration of the time for redemption, will not invalidate the title conveyed by the tax deed to the tax purchaser of the real estate. Id.

See LAND GRANT.

TAX SALE, 125.

See TAX, 20, 21.

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TEXAS STATUTE, 541.
See PLEADING AND PRACTICE, 21.

TITLE.
See LAND GRANT.

TITLE, TAX, 125.
See TAX, 20.

TRANSPORTATION CONTRACTS, 1.
See CORPORATION, 1.

TRESPASS, 48.
See WATER, 4.

TOWN BOND.
See BOND.

MEETING, 139.
See BOND, 2, 3.

ULTRA VIRES, 1, 145.
See BOND, 6; CONTRACT, 1; CORPORATION, 1–7.

UNITED STATES STATUTE.
See LAND GRANT, 1, 2, 4–8, 10–12.

VERDICT, GENERAL AND SPECIAL.
See PLEADING AND PRACTICE, 16–19.

WATER.
1. The grant of a right of way across one's lands to a railroad company is no license to it to overflow the grantor's lands by the unskilful construction of a levee on the right of way. St. Louis, etc., R. R. Co. *v.* Morris, 48.
2. The statute of limitations of three years applies to actions against a railroad company for overflowing one's land by the building of a levee, and commences as soon as the levee is completed. Id.
3. A railroad company building a levee across a branch which overflows, and thereby causing a greater overflow of adjoining lands, is not relieved from damages therefor by making ditches and trestles that carry off the water as fast as the branch would when not overflowed. Id.
4. Railroad companies, acting within the limits of their franchises, and using due skill and care in the construction and operation of their roads, and having the right of way, are not liable as trespassers, nor for injuries to outside property which are the natural and unavoidable effect of the road. Id.
5. Damages for overflowing land by the construction of a railroad levee cannot be diminished by the enhanced value given to the land in common with other lands in the vicinity by the presence of the road. Id.
6. The rule for assessing damages for overflowing land by the construction of an embankment is, to take the actual value of the land at the completion of the work, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as before the construction of the embankment, and fix the damages at the difference. Id.
7. A railroad was located across plaintiff's farm, and constructed over two sloughs, from which the water, in its natural state, flowed in a pure stream. In constructing the road one of the sloughs was dammed up, the water diverted, and carried over loose sand and dirt to the other, the loose sand and dirt being thereby carried upon plaintiff's land, and deposited to his injury. *Held*, that it was competent to testify as to the value of the land with the slough dammed and its value with a culvert under the road, so as to allow the water to flow in its natural course; that as the action was based on negligence in constructing the road, it was not material that other roads were constructed in the same manner. A party is entitled to have a stream of water flowing through his lands remain unobstructed, and if its course is diverted to his injury, to recover damages therefor. Action held not barred by the statute of limitations. Van Orsdal *v.* Burlington, etc., R. R. Co., 58.

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WATER—*Continued.*

8. The breaking of a culvert under the embankment of defendant's road, in a freshet, having caused an accumulation of water, which, the embankment being opened, overflowed plaintiff's land to his damage, the circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff, 'no matter how much care and caution they exercised. *Held*, erroneous, and that the defendant was not liable unless guilty of negligence in setting free the accumulated water. Mills *v.* Greenville, etc., R. R. Co., 55.

9. The owner of land may, upon the boundaries thereof, not interfering with any natural or prescriptive watercourse, erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands he is not responsible; but such waters as fall in rain and snow upon his lands, or come thereon by surface drainage from or over contiguous lands he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. Cairo, etc., R. R. Co. *v.* Stevens, 58.

10. The breaking of a culvert under the embankment of defendant's road in a freshet, having caused an accumulation of water, which, the embankment being opened, overflowed plaintiff's land to his damage, the circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff, no matter how much care and caution they exercised. *Held*, erroneous, and that the defendant was not liable unless guilty of negligence in setting free the accumulated water. Cairo, etc., R. R. Co. *v.* Howry, 62.

11. A land-owner has no right, by erecting an embankment, to stop the natural flow of surface water, or to divert its course so as to throw it upon the land of his neighbor. Overflowed water from a river, in time of flood, is surface water within the meaning of this rule. Shane *v.* Kansas, etc., R. R. Co., 64.

12. A railroad company whose road was built upon a right of way granted to the company by the proprietor for that purpose, so constructed its road-bed and ditches as to collect and discharge water upon adjacent lands of the latter. In an action against the company to recover for the damages thus sustained, the evidence was conflicting as to whether the water was that of a running stream or natural water-course or whether it was simply surface water. The trial court, after instructing the jury as to what constitutes surface water, and what a stream or water-course, further instructed them in substance as follows: 1. That if the water was surface water the company was not liable, provided its road-bed and ditches were constructed with reasonable care and skill with reference to the use of the same for railroad purposes. The company was not bound to make ditches to protect plaintiff's land from injury from surface water. 2. But if the water was that of a stream or natural water-course, and it was diverted from its natural channel, the company was liable; provided, however, that plaintiff could not recover for damages which he might have averted at comparatively small cost. The company was bound to make sufficient ditches and passages to conduct the water away and prevent it from injuring plaintiff; but if it did not do so, it was the duty of plaintiff to use all reasonable means to avert and avoid injury by the construction of ditches and levees himself within a reasonable time, if the same could be done at a reasonable amount of labor and expense. On appeal by the company from a verdict and judgment for plaintiff,—*Held*, that the company had no right to complain of these instructions. Munkres *v.* Kansas City, etc., R. R. Co., 79.

13. The fact that a railway company, in constructing its road-bed, has filled up an artificial ditch on the land of a third person, by which surface water was conducted from the plaintiff's premises to a river, and has thus turned back the water upon said premises, is no ground of action. O'Connor *v.* Fond du Lac, etc., R. R. Co., 89.

14. If the construction of a railroad across a farm lessens its value by preventing the flow of surface water from one part of the farm to another, this is a

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WATER—*Continued.*

proper element to be taken into consideration in fixing the amount of compensation to which the owner is entitled. The rules of law governing the rights of adjacent owners, as to the flow of surface water from the land of one on to the land of the other, have no application to such a case. Pfleger *v.* Hastings, etc., R. R. Co., 85.

15. It is incumbent upon an appellant to show error prejudicial to himself; and as it does not appear in this case whether the interruption of the flow of surface water complained of consisted in preventing its flow from the land of an adjacent owner upon premises of respondent, or in preventing its flow from one part of defendant's farm to another part, it will be presumed that the court below was correct, under the facts of the case, in instructing the jury that if the construction of the railroad interfered with the flow of surface water in such a way as to depreciate the value of the farm, they had a right to take it into consideration. Id.

See RIPARIAN RIGHTS.

WATERCOURSE.

See WATER.

WISCONSIN STATUTE, 28, 300.

See BOND, 46. CORPORATION, 10.

WORK OF NECESSITY, 40.

See SUNDAY, 1, 2.

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